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COURT OF CRIMINAL APPEALS
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PD-1035-20
In the Court of Criminal Appeals of Texas
At Austin

FILED
COURT OF CRIMINAL APPEALS
11/17/2020
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———♦———

No. 14-18-00162-CR
In the Court of Appeals
For the Fourteenth District of Texas
At Houston

———♦———

No. 1530454
In the 177th District Court
Of Harris County, Texas

———♦———

Vincent Depaul Stredic
Appellant

v.

The State of Texas
Appellee

———♦———

State's Petition for Discretionary Review

———♦———

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Oral Argument Requested

Statement Regarding Oral Argument

The Fourteenth Court reversed a murder conviction because the trial court gave the jury five pages of accurate transcript in response to the jury's request to "see" disputed testimony.

This case presents two worthwhile questions. First, does Article 36.28, which allows the jury to request a read back of disputed testimony, affirmatively prohibit the trial court from granting the jury's request to see disputed testimony? Second, does it violate a defendant's substantial rights to allow the jury to see part of a trial transcript, so that reversal is required?

The State requests oral argument.

Identification of the Parties

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Trial Court:

> **Robert Johnson**, presiding judge

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Statement of the Case

The appellant was indicted for murder. (CR 21). The indictment alleged two prior felony convictions, with one for an offense committed after the other conviction became final. (CR 21). The appellant pleaded not guilty but a jury found him guilty as charged. (3 RR 9-10; CR 148). The jury found both enhancement paragraphs true and assessed punishment at thirty years' confinement. (CR 160, 165). The trial court certified the appellant's right of appeal, and the appellant filed a notice of appeal. (CR 169, 170).

In a since-withdrawn opinion, a split panel of the Fourteenth Court originally affirmed the appellant's conviction in November 2019. (Appendix B). In dissent, Justice Spain argued the non-constitutional error in the case—giving the jury five pages of accurate transcript that responded to a jury request to "see" disputed testimony—required automatic reversal because it was "impossible" to conduct a "meaningful" harm analysis. (*Id.*, Spain, J., dissenting).

After the appellant filed a motion for en banc reconsideration, the panel withdrew its opinion and, in a published opinion written by Justice Spain, a split panel reversed the appellant's conviction and remanded the case for a new trial. *Stredic v. State*, ___ S.W. 3d ___, No. 14-18-

00162-CR, 2020 WL 4689854 (Tex. App.—Houston [14th Dist.] Aug. 13, 2020, pet. filed). The State filed a motion for reconsideration, which prompted the prevailing two justices of the panel to issue a "Supplemental Majority Opinion" on September 29. *Id.* at *10. That opinion again reversed the trial court's judgment and remanded for a new trial.

Grounds for Review

1. The Fourteenth Court erred by holding a trial court cannot grant a jury's request for a transcript of disputed testimony.

2. The Fourteenth Court erred by conducting a harm analysis that did not consider the strength of the State's evidence, the weakness of the defense, or the lack of a logical connection between the supposed error and any legally determinative issue.

Reasons to Grant Review

The panel majority made several serious errors in this published opinion. The most glaring is the harm analysis. As the dissent pointed out, the majority failed to consider the entire record like this Court requires. In assessing the harm from giving the jury five pages of accurate transcript that responded to the jury's request to "see" disputed testimony, the Fourteenth Court focused exclusively on the error itself and did not consider the strength of the State's case, the weakness of the

appellant's defense, or the fact that the transcript did not bear on a legally determinative issue. The opinion contains very little discussion of the facts of the case, but the undisputed evidence here showed that the appellant was upset with the complainant and pointed a shotgun at his head; the only dispute was whether he pulled the trigger or whether the gun just "went off." The transcript given to the jury was just the appellant's consistent statements that he was afraid when he pointed the shotgun at the complainant. Self-defense was not an issue in this case.

But the majority's holding on the merits is also a gross departure from the accepted and usual course of judicial proceedings. The majority held that the existence of a statute that lets the jury request a readback of disputed testimony meant that it was error for the trial court to give the jury a short transcript in response to a jury request to "see" disputed testimony. This is an unprecedented holding in a published opinion.

Statement of Facts

The appellant was driving three of his friends around. (5 RR 87-91). They made fun of the appellant for driving too slow. (5 RR 96). Eventually the appellant pulled into a gas station to get gas, though he

did not pull up to a pump. (5 RR 96-98). The appellant and the complainant, Christopher Barriere, briefly went into the gas station. (5 RR 99).

When Barriere, returned, he and another passenger, Rodrick Harris, talked outside the car. (5 RR 99). The appellant opened the trunk and got out a shotgun. (5 RR 98-99). The appellant walked to the driver's door, holding the shotgun down by his side. (State's Ex. 31). The appellant walked back behind the car and shot Barriere in the head, killing him. (5 RR 101-02).

Harris charged at the appellant, but retreated when the appellant pointed the gun at him. (5 RR 102, 105). The appellant got in the car and drove away. (5 RR 108). Harris went to look at Barriere's body. (5 RR 107). The appellant drove back up and menaced Harris with the shotgun. (5 RR 108). When Harris backed away, the appellant drove off again. (5 RR 109).

About 5 minutes later, the appellant parked slightly offsite and returned, this time shooting Harris in the face and a bystander in the ankle. (4 RR 95-96; 5 RR 110).

These events are mostly caught on video; the second shooting takes place just off camera, though the reactions of bystanders are obvious. State's Exhibit 31 has eight converted video files. CH13.avi and CH14.avi show different angles of the offense. Here are the times in the videos at which important events occur:

Event	**CH13.avi**	**CH14.avi**
First shooting	22:00-23:00	19:15-21:10
Appellant returns	24:30-25:22	21:40-22:30
Second shooting	31:00-32:00	28:00-28:30

The appellant gave an ambiguous statement to police admitting he was at the scene, but not admitting he was the shooter. (6 RR 39; *see* State's Ex. 36). At trial, the appellant testified that when he returned from inside the gas station he found Barrierre and Harris high on PCP, so he told them to leave his car. (6 RR 59, 62, 96). When they refused, he retrieved the shotgun. (6 RR 68). According to the appellant, Barriere and Harris got out of the car and got confrontational. (6 RR 71-72). The appellant claimed he pointed the shotgun above Barriere and, even though the appellant's finger was not on the trigger, the gun "went off" and shot Barriere in the head. (6 RR 73-74).

The appellant testified he did not see the shotgun round hit Barriere, and he was unaware Barriere was hit. (6 RR 74-75). But the appellant also testified that the reason he returned to the scene was to check on Barriere's status. (6 RR 98).

Procedural Background

I. In the Trial Court: The jury asked to "see" disputed testimony. Over the appellant's objection, the trial court gave the jury five pages of transcript.

During deliberations, the jury asked to "have access to the [appellant's] testimony." (CR 125). The trial court replied: "If the jury disagrees as to the statement of any witness, they may, upon applying to the court, have reproduced that part of such witness['s] testimony on the point in dispute." (CR 125). The jury sent another note: "Can we see the portions of the defendant's testimony where he states whether or not he felt threatened by the deceased or the second complainant?" (CR 126). The trial court responded with a form quoting Article 36.28 and asking the jury to certify what testimony it disagreed about. (CR 127).

The jury said it disagreed about the appellant's testimony on direct examination: "Did he feel threatened by Christopher Barriere and [Rodrick] Harris?" (CR 127). The jury also sent another note:

> "The jury is in disagreement as to the statement of a witness. Can we see the court reporter's notes when [the appellant] was the witness, when the State['s] Attorney was questioning him regarding his statement or if [the appellant] felt threatened by Christopher Barriere and [Rodrick] Harris."

(CR 128).

The trial court told the parties it intended to respond: "The Court will provide you readback concerning the defendant and the statement in dispute by transcript." (7 RR 52). Defense counsel objected, claiming that providing a transcript was a "comment on the weight of the evidence," and violated his Sixth Amendment right to a fair trial, his Fourteenth Amendment right to due process, and due course of law. (7 RR 53). Defense counsel explained that "providing a written transcript creates a greater emphasis and places more importance on that particular testimony since jurors must recall from their own … what they heard as far as the other issues are concerned." (7 RR 52-53).

The prosecutor said this procedure was allowed by Code of Criminal Procedure 36.28. (7 RR 53). The prosecutor argued it was appropriate to give the jury a transcript because "that is specifically what the jury is asking for." (7 RR 53).

Defense counsel responded that "[t]o the extent Article 36.28 would permit a written transcript of testimony under these circumstances," it violated the state and federal constitutions. (7 RR 54). Defense counsel specified, though, he did not object to the actual content of the transcript, because it responded to the jury's dispute. (7 RR 54-55).

The trial court sent back five partial pages of transcript, all of which related to whether the appellant was afraid when he pointed the gun at Barriere. (CR 129-133). Nothing in the transcript described the appellant's mental state when he shot Barriere.

II. In the Fourteenth Court

A. The appellant argued that giving the jury the transcript violated Article 36.28. The State replied that Article 36.28 did not prohibit giving the jury a transcript.

On appeal, the appellant claimed "the law does not permit the court to provide the jury with a written transcript of … disputed testimony." (Appellant's Brief at 19). For this assertion, the appellant quoted Article 36.28, which is silent about giving the jury a transcript:

> In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court re-

> porter's notes that part of such witness testimony or the particular point in dispute, and no other; but if there be no such reporter, or if his notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as he can in the language used on the trial.

(*Id.* (quoting TEX. CODE CRIM. PROC. art. 36.28)).

The only case the appellant cited for his proposition was *Garrett v. State*, 658 S.W.2d 592 (Tex. Crim. App. 1983). Garrett complained that the jury was allowed to read a transcript of an audio recording while the recording was played at his trial. This practice had been forbidden in an earlier case, but *Garrett* held there was no error. *Id.* at 593. In doing so, like many opinions from its era, *Garrett* added some dicta about unrelated laws, including Article 36.28: "Since the transcript was not introduced and not available during jury deliberations, there was no danger of the jury having the evidence before them during deliberations in violation of [Article 36.28], and thereby being unduly influenced by it."

Here, the State made two reply arguments. First, it argued the appellant's Article 36.28 argument was unpreserved because it differed from his trial argument. (State's Appellate Brief at 2-4). Second, the State noted the appellant did "not point to any statute that the trial court violated." (*Id.* at 4). The State also noted "the holding in *Garrett* has no

relevance to this case, and *Garrett's* dicta is not controlling here." (*Id.* at 6).

B. After first affirming, the Fourteenth Court granted rehearing and reversed without addressing the State's arguments.

On original submission the Fourteenth Court affirmed. (Appendix B). In an opinion by Justice Wise, the court held that any error would not have caused enough harm to warrant reversal. In a dissent, Justice Spain argued that Rule of Evidence 606—prohibiting juror testimony about deliberations—made a "meaningful" harm analysis "impossible." Justice Spain also commented that finding the error harmless turned the court into a "super legislator" and "effectively repeal[ed]" Article 36.28.

On the appellant's motion, the panel granted rehearing and reversed. In a majority opinion by Justice Spain, the panel majority held that "the plain meaning" of Article 36.28 is "clear." *Stredic*, 2020 WL 4689854 at *2. The panel pointed out that Article 36.28 "only expressly authorizes oral readback of the court reporter's notes," and "does not authorize the trial court to provide the jury with a written transcript." *Ibid.* The majority concluded the trial court "clearly abused its discretion." *Ibid.*

The majority concluded the error was harmful because it was a comment on the weight of the evidence: "[T]he provision of excerpts from the court reporter's notes in transcript form concerning an essential element of the alleged offense[1] to be assessed and considered as written evidence in the jury room … amounted to an impermissible comment on its importance by the trial court and unfairly tipped that balance in favor of the State…" *Id.* at *5. The majority concluded it harmed the appellant to give the jury a copy of his testimony because his testimony "indicated he could not maintain a consistent story about what happened and what he felt during the incident, *i.e.*, his culpable mental state.[2]"

The majority ended its harm analysis with an echo of Justice Spain's original dissenting opinion: "[W]e can never know for sure what influenced this jury in making its verdict, given the almost impenetrable wall surrounding deliberations. *See* TEX. R. EVID. 606(b)." *Ibid.* The majority found the error harmful and reversed.

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[1] This is wrong. The transcript did not concern an element of the offense.

[2] This again is wrong. The transcript concerned whether he was afraid when he pointed the gun at Barriere, not whether he acted intentionally, knowingly, recklessly, or negligently by shooting Barriere. Fear could be consistent with any of these mental states.

Justice Zimmerer joined the majority and wrote a concurring opinion. Citing *Garrett* and *Lewis v. State*, 529 S.W.2d 533 (Tex. Crim. App. 1975),[3] he argued the jury might have been "unduly influenced" by the transcript, and the transcript constituted "bolstering."[4] *Stredic*, 2020 WL 4689854 at *7-8 (Zimmerer, J., concurring). Justice Zimmerer compared what occurred here to the "hurt" caused by having "one's own words … selectively recalled" in an argument "with a close friend or spouse." *Id.* at *8. He concluded the error required reversal because the transcript "appear[ed] to be the critical testimony upon which the appellant was convicted of the aggravating factor."[5] *Ibid.*

Justice Wise agreed that the trial court erred but believed the error did not warrant reversal. *Id.* at *9 (Wise, J., dissenting). Justice Wise cited two cases, including one from this Court, holding that this sort of

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[3] Citing both *Garrett* and *Lewis* is peculiar, because *Garrett* largely abrogated the relevant holding in *Lewis*. *See Guerra v. State*, 760 S.W.2d 681, 691 (Tex. App.—Corpus Christi 1988, pet. ref'd) (recognizing *Garrett* "substantially discarded" *Lewis*).

[4] "Bolstering" is no longer a standalone objection. *Rivas v. State*, 275 S.W.3d 880, 886-87 (Tex. Crim. App. 2009) (pointing out that Rules of Evidence do not prohibit "bolstering," and objection must be more specific). The harm of bolstering was improperly *strengthening* a witness's testimony. Wouldn't a defendant whose defense rested entirely on his testimony want it bolstered?

[5] Justice Zimmerer did not explain what "the aggravating factor" for murder was, nor how the appellant's testimony about his fear was "critical" to proving it.

error was harmless. *Id.* at *10 (citing *Miller v. State*, 79 S.W.2d 328 (1935), *Higdon v. State*, 764 S.W.2d 308 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd)).[6] Justice Wise pointed out it was the jury, not the judge, who requested the transcript, so it was not a judicial comment on the weight of the evidence. *Ibid.* He also pointed out that the transcript concerned the same testimony that would have been read aloud under Article 36.28, and it came from both direct and cross-examination. He noted that there was significant other evidence about the appellant's mental state, and the State's closing argument focused on other evidence of the appellant's intent, such as his actions. *Ibid.*

[6] The majority addressed these cases in a footnote. *Stredic*, 2020 WL 4689854 at *5 n.6. The majority distinguished *Miller* by claiming it "involved a bill-of-exceptions procedure that no longer exists"—which is true but irrelevant to the harm analysis—and did not discuss "preservation of any statutory violation"—which is also not relevant to its harm analysis. The majority distinguished *Higdon* because the harm holding there was an alternate holding.

C. On a second rehearing, the panel addressed the State's arguments. The majority held that Article 36.28 banned all alternative methods of providing the jury with disputed testimony.

The State moved for rehearing, pointing out that court had not addressed its arguments. The panel granted rehearing and issued a "supplemental majority opinion" again reversing the trial court. *Stredic*, 2020 WL 4689854 at *10 (op. on reh'g).

The majority rejected the State's preservation argument and held the appellant's objection that "providing a written transcript creates a greater emphasis and places more importance on that particular testimony" preserved the complaint that providing a transcript violated Article 36.28. *Ibid.*

As for the State's argument that Article 36.28 does not prohibit giving the jury a transcript, the panel majority called this an "implausible" reading of the statute. *Ibid.*

> While the statute does not spell out all of the potential ways the jury is *not* allowed to review the testimony of a witness, it is not difficult to connect the dots and conclude that procedures not authorized by the plain language of the article are prohibited.

Ibid. Much like the concern Justice Spain expressed in his original dissent about courts becoming "super legislator[s]" if they did not reverse

for statutory violations, the panel majority declared the State's interpretation incorrect because it "would render [A]rticle 36.28 a nullity, a toothless provision merely containing two examples of ways in which testimony possibly might be provided to the jury, as opposed to delineating the only two ways the jury is permitted to receive it." *Ibid.*

Ground One

The Fourteenth Court erred by holding a trial court cannot grant a jury's request for a transcript of disputed testimony.

The State's argument to this Court is as simple as it was to the Fourteenth Court: Article 36.28 does not prohibit giving the jury a transcript in response to a question about disputed testimony.

The majority's claim that it was easy to "connect the dots" and conclude that anything not explicitly authorized by statute is forbidden ignores the reality that many—perhaps most—things in a typical trial are not explicitly allowed by statute. If appellate courts reversed every time a trial court acted without explicit statutory authorization, there would be a lot of unjust reversals.

In its motion for rehearing, the State pointed to *Milton v. State*, 572 S.W.3d 234 (Tex. Crim. App. 2019), where this court acknowledged

that, despite no statute or rule explicitly allowing it, trial courts had discretion to permit parties to use visual aids in closing argument. Under the panel majority's "connect the dots" approach, this Court's opinion in *Milton* was wrong.

Milton's approach to a procedure that is not explicitly authorized shows how this Court should treat this case. *Milton* held that visual aids were permissible even without a rule or statute explicitly allowing them, but the visual aids still had to abide by the general rules that apply to jury arguments. Thus where the visual aid in *Milton* presented a danger for unfair prejudice, it was exactly as objectionable as would have been a verbal argument that was also unfairly prejudicial.

Milton's approach reflects the approach taken by the Rules of Appellate Procedure. Appellate courts must ignore any non-constitutional error, defect, irregularity, or variance that did not affect a defendant's substantial rights. If the trial court's actions did not violate a law, what substantial right, *exactly*, was violated?

How should this Court review a trial court's decision to give a jury a transcript? The same as it should any other judicial communication with the jury. There's no statute explicitly allowing the trial court to give the jury a transcript, just like there's no statute explicitly allowing the

trial court to tell the jury, "Good morning." But there are general rules that control judicial communications with the jury.

This Court has emphasized that the point of Article 36.28 is "to balance our concern that the trial court not comment on the evidence with the need to provide the jury with the means to resolve any factual disputes it may have." *Thomas v. State*, 505 S.W.3d 916, 923 (Tex. Crim. App. 2016)(quoting *Howell v. State*, 175 S.W.3d 786, 790 (Tex. Crim. App. 2005)). Cases where judges have violated this statute have revolved around what evidence the trial court did or did not have read to the jury. By giving the jury too much testimony, or testimony about which the jury does not have a disagreement, the trial court is effectively conveying its opinion that certain testimony was important.

That's not a concern here because the transcripts directly responded to a jury question about disputed testimony. The panel majority held that granting the jury's request for the transcript was a judicial comment on the weight of the evidence, but, as the dissent pointed out, that's just wrong. Any import the jury gave to this testimony began and ended with the jury itself. It's far more likely the jury would have inferred a comment from the trial court's refusal to give them a transcript than from merely granting a specific request.

In this case the trial court did not comment on the weight of the evidence or violate any other law. The Fourteenth Court erred by holding that it did, and this Court should grant review and reverse that decision.

Ground Two

The Fourteenth Court erred by conducting a harm analysis that did not consider the strength of the State's evidence, the weakness of the defense, or the fact that the supposed error did not bear on a legally determinative issue.

Although the panel majority's harm analysis takes up most of the opinion, it contains remarkably little content. The harm analysis consists of 1) repeating, several times, that there was error; 2) seriously misstating the import of the transcribed testimony; and 3) complaining that Rule of Evidence 606's prohibition on inquiring into jury deliberations makes harm analyses hard. *Stredic*, 2020 WL 4689854 at *2-6. The majority failed to consider the strength of the State's case, the weakness of the defense, or the fact that the transcribed testimony was tangential to any legally determinative issue.

Four years ago in *Thomas*, this Court emphasized that a proper harm analysis for Article 36.28 error must consider the entire record. *Thomas*, 505 S.W.3d at 916. There, the court of appeals's harm analysis

looked only at the content of the statements that were read back to the jury. Although this Court affirmed in *Thomas*, it noted that the court of appeals's harm analysis was too narrow:

> In assessing the likelihood that the jury's decision was adversely affected by the error, the reviewing court should consider all of the testimony and physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case, and closing arguments.

Id. at 927.

Here, the panel majority made the same mistake as the court of appeals in *Thomas*, focusing almost exclusively on the content of the appellant's testimony.

A comparative review of the evidence of guilt and the defensive evidence shows the evidence of an intentional killing was overwhelming. The appellant was on video pointing a shotgun at a man's head and killing him. His defense—that the gun just randomly "went off" at the precise moment he was pointing it at someone's head[7]— was ridiculous;

[7] The appellant even denied pointing the gun at Barriere. (6 RR 91). He claimed he pointed it in the air above Barriere, though the results of the shot prove that was incorrect. On the video, the appellant appears to pointing the gun slightly downward.

if guns just "went off," people wouldn't have them, and gun manufacturers would go out of business under the weight of lawsuits. The appellant did not introduce the shotgun into evidence to show it had a mechanical defect, nor did he testify the gun had just "gone off" on other occasions.

The appellant testified he did not rack the shotgun after he got it from the trunk, meaning the shotgun had had a round in the chamber the entire time he was driving around. (*See* 7 RR 87). The appellant's defense hinged on a loaded shotgun bouncing around in his trunk for a long drive without going off, but then it went off, without a trigger pull, in the appellant's hands at a very unlucky moment.

On the video, the appellant's reaction does not look like the reaction of someone who just had a 12-gauge unexpectedly go off in his hands. The appellant has the composure to immediately point the gun at Harris when Harris charged him. He showed no obvious concern for Barriere, and he chased Harris away before casually getting into the car and driving off. He then returned twice to menace Harris, shooting him the second time. When he spoke with police he said nothing about being the shooter. Aside from the appellant's own testimony, nothing in the record suggests this was an accident.

Aside from skipping over the strength of the State's evidence and the weakness of the defense, the panel majority also misstated the logical relevance of the transcribed testimony. The majority opinion said the testimony related to an element of the offense, and the concurrence said it was "critical" to proving the "aggravating factor." Both of these descriptions are wrong.

The transcribed testimony related only to whether the appellant was afraid when he pointed the gun at Barriere. This was not a self-defense case—the appellant specifically said he did not shoot Barriere in self-defense, and the jury charge had no self-defense instruction. So whether the appellant was afraid when he pointed the gun might have interested the jury, but it did not resolve whether he acted intentionally or knowingly when he shot Barriere.

Part of the majority's finding of harm stemmed from its statement that the transcript was "especially" a comment on the weight of the evidence because the "appellant's testimony indicated he could not maintain a consistent story about what happened and what he felt during the incident, *i.e.*, his culpable mental state." *Stredic*, 2020 WL 4689854 at *5-6. That's wrong for two reasons. First, the transcribed testimony did not highlight any inconsistencies; the appellant was very consistent that

he was afraid of Barriere and Harris when he pointed the gun. Second, whether the appellant was afraid of Barriere was not his culpable mental state; his culpable mental state was whether he intentionally or knowingly killed Barriere. The appellant's fear before doing so is tangential to that issue.

The panel majority limited its harm analysis to the error itself; that's the approach this Court denounced in *Thomas*. In doing so, the majority reversed a murder conviction where the evidence of guilt is overwhelming, the defensive evidence was incredible, and the supposed error did relate to a legally determinative issue. This Court should grant review of this case and reverse the Fourteenth Court.

Conclusion

The State asks this Court to grant review of the Fourteenth Court's decision and reverse its judgment.

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Date: November 13, 2020

Appendix A

***Stredic v. State*, ___ S.W. 3d ___, No. 14-18-00162-CR, 2020 WL 4689854 (Tex. App.—Houston [14th Dist.] Aug. 13, 2020, pet. filed)**

KeyCite Yellow Flag - Negative Treatment
Opinion Supplemented on Rehearing September 29, 2020
2020 WL 4689854
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas, Houston (14th Dist.).

Vincent Depaul STREDIC, Appellant
v.
The STATE of Texas, Appellee

NO. 14-18-00162-CR
|
Opinions on Rehearing filed August 13, 2020
|
Rehearing Granted September 29, 2020

Synopsis

Background: Defendant was convicted in the 177th District Court, Harris County, of murder. Defendant appealed.

The Court of Appeals, Wise, J., held that trial court's error in providing jury with written transcript of defendant's testimony rather than orally reading testimony to jury affected defendant's substantial rights.

Reversed and remanded.

Zimmerer, J., filed concurring opinion.

Wise, J., filed dissenting opinion.

On Appeal from the 177th District Court, Harris County, Texas, Trial Court Cause No. 1530454

Attorneys and Law Firms

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Theodore Lee Wood, Austin, for Appellant.

Panel consists of Justices Wise, Zimmerer, and Spain

MAJORITY OPINION ON REHEARING

Charles A. Spain, Justice

***1** As a society, we accord high deference to the jury system. We respect the jury's role, indeed its duty, to judge the facts, believe or disbelieve witness testimony, and resolve conflicts in the evidence. However, the jury's ability to fulfill its duty cannot be separated from, and indeed depends on, the trial court's duty to properly apply procedural rules to ensure the jury can fairly and impartially deliberate and render a verdict based on the law and the evidence. This evidence is supposed to consist of the testimony that the jury hears and the exhibits that the jury sees. In this case—over appellant's objection—the trial court violated Code of Criminal Procedure article 36.28 by providing28 the deliberating jury with written excerpts of appellant's trial testimony. In this case, the error affected appellant's substantial rights and cannot be disregarded as a mere procedural irregularity.

The court initially affirmed the trial court's judgment, in which appellant Vincent Depaul Stredic was convicted of murder and sentenced to imprisonment for 30 years. *Stredic v. State*, No. 14-18-00162-CR, 2019 WL 6320220, at *1–6 (Tex. App.—Houston [14th Dist.] Nov. 26, 2019, no pet. h.); *id.* at *6–13 (Spain, J., dissenting); *see* Tex. Penal Code Ann. §§ 12.42(d), 19.02.

Appellant timely filed a motion for rehearing, which only argued the unconstitutionality of section 133.058(a) of the Local Government Code, which authorizes a ten-percent service fee for the collection of the consolidated court cost by counties such as Harris County. *See* Tex. Loc. Gov't Code Ann. § 133.058; Tex. R. App P. 49.1. The State filed a response. *See* Tex. R. App. P. 49.2. The court denied the motion for rehearing. Appellant also timely filed a motion for en banc reconsideration, which argued the trial court committed reversible error by violating article 36.38 of the Code of Criminal Procedure, as well as the unconstitutionality of the section-133.058(a) service fee for collecting the consolidated court cost. *See* Tex. R. App P. 49.7. The State again filed a response. The court grants rehearing on its own motion on the article-36.38 issue raised in the motion for en banc reconsideration. *See* Tex. R. App P. 49.3.

For clarity, we summarize the new holdings. In his first issue, appellant argues that Code of Criminal Procedure article 36.28 does not allow for a written transcript of disputed testimony to be provided to the jury during deliberations. *See* Tex. Code Crim. Proc. Ann. art. 36.28. Appellant also contends that he was harmed by the trial

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court's error. We agree.

Statutory construction is a question of law we review de novo. *Williams v. State*, 253 S.W.3d 673, 677 (Tex. Crim. App. 2008). When interpreting statutory language, we focus on the collective intent or purpose of the legislators who enacted the legislation. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). We construe a statute according to its plain meaning without considering extratextual factors unless the statutory language is ambiguous or imposing the plain meaning would cause an absurd result. *See id.* at 785–86. Applying the canons of construction to determine the meaning of a statute, we presume that (1) compliance with the constitutions of this state and the United States is intended, (2) the entire statute is intended to be effective, (3) a just and reasonable result is intended, (4) a result feasible of execution is intended, and (5) public interest is favored over any private interest. *Clinton v. State*, 354 S.W.3d 795, 800 (Tex. Crim. App. 2011); *see* Code Construction Act, Tex. Gov't Code Ann. § 311.021.

***2** Article 36.28 provides:

> In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute, and no other; but if there be no such reporter, or if his notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as he can in the language used on the trial.

Tex. Code Crim. Proc. Ann. art. 36.28. Article 36.28 is not ambiguous, nor does imposing its plain meaning impose an absurd result. Instead, the plain meaning of the statute is clear. The statute only expressly authorizes oral readback of the court's reporter's notes concerning the particular disputed testimony, or when there is no reporter or the reporter's notes cannot be read, for the witness to repeat such testimony on the stand. *See id.* The statute does not authorize the trial court to provide the jury with a written transcript of the court reporter's notes, as was done here. *See id.*[1] Therefore, we conclude that the trial court violated article 36.28 and clearly abused its discretion by supplying—over appellant's objection—disputed testimony to the deliberating jury in a manner not authorized by statute. *See id.*; *Thomas v. State*, 505 S.W.3d 916, 923 (Tex. Crim. App. 2016).

[1] The parties do not provide, and we have not located, any statute otherwise permitting the trial court to provide a deliberating jury with a written transcript of a witness's testimony. Nor do the parties point us to, and we have not located, any controlling case. Most cases involving article 36.28 concern whether there was sufficient indication the jury disagreed such that the trial court should even have provided readback of witness testimony or whether the trial court properly ascertained the scope of the disputed witness testimony to be provided by readback to the jury. But this case does not present such issues. *See infra* note 2.

Even assuming without deciding that a violation of the nondiscretionary portion[2] of article 36.28 is purely statutory and not constitutional error,[3] and even assuming without deciding that such an error lends itself to a traditional harm analysis under rule 44.2, we conclude that the error affected appellant's substantial rights. *See* Tex. R. App. P. 44.2(b) ("Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); *Thomas*, 505 S.W.3d at 925 (applying rule 44.2(b)). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997); *see Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). "[A]n error had a substantial and injurious effect or influence if it substantially swayed the jury's judgment." *Thomas*, 505 S.W.3d at 926. The proper inquiry is "whether the error itself had substantial influence[;] If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos*, 328 U.S. at 765, 66 S.Ct. 1239. But if "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *Id.* at 764, 66 S.Ct. 1239.

[2] The discretionary portions of the statute are not at issue because appellant did not object in the trial court and does not challenge on appeal that the jury disagreed as to his testimony or the content of his testimony provided.

[3] The Court of Criminal Appeals has not substantively addressed a violation of the nondiscretionary portion of article 36.28. The court has not yet categorized a litigant's right to only have the jury hear oral readback of the court reporter's notes of disputed witness testimony or disputed testimony repeated "verbatim" by the witness on the stand. In other words, it is not settled under *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), whether such an error needs to be preserved at trial (as it was here) to be raised on appeal. Nor has the Court of Criminal Appeals considered whether such error is purely statutory or perhaps may have some constitutional dimension that affects whether it should be subject to harmless-error analysis under rule 44.2(a).

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> *See* Tex. R. App. P. 44.2(a) ("If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.").

***3** Appellant argues that seeing the testimony in written form "may have substantially swayed the jury to believe that [appellant]'s shooting of ... [complainant Christopher Joel] Barriere was intentional or knowing." Appellant contends that "[i]f not for the emphasis on this testimony, the jury may quite possibly have found [appellant] guilty of only manslaughter or criminally negligent homicide."

A person commits murder "if he ... intentionally or knowingly causes the death of an individual [or] intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." Tex. Penal Code. Ann. § 19.02(b). "A person acts intentionally, or with intent, with respect ... to a result of his conduct when it is his conscious objective or desire to ... cause the result." Tex. Penal Code. Ann. § 6.03(a). "A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." Tex. Penal Code. Ann. § 6.03(b).

A person commits manslaughter "if he recklessly causes the death of an individual." Tex. Penal Code. Ann. § 19.04(a). "A person acts recklessly, or is reckless, with respect to ... the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that ... the result will occur." Tex. Penal Code. Ann. § 6.03(c).

A person commits criminally-negligent homicide "if he causes the death of an individual by criminal negligence." Tex. Penal Code. Ann.§ 19.05(a). "A person acts with criminal negligence, or is criminally negligent, with respect to ... the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that ... the result will occur." Tex. Penal Code. Ann. § 6.03(d).

Lesser-included offenses, such as manslaughter and criminally-negligent homicide, are properly submitted to the jury if the record contains some evidence which would permit a jury to rationally find that if the defendant is guilty, he is guilty of only the lesser offense. *See Lugo v. State*, 667 S.W.2d 144, 147 (Tex. Crim. App. 1984). This is so regardless of whether the evidence is weak, impeached, or contradicted. *Bell v. State*, 693 S.W.2d 434, 442 (Tex. Crim. App. 1985). A defendant's own testimony, though contradicted, is sufficient to require an instruction on a lesser-included offense. *Hunter v. State*, 647 S.W.2d 657, 658 (Tex. Crim. App. 1983). In appellant's charge, the jury was provided with both manslaughter and criminally-negligent homicide as lesser-included offenses to murder. The State did not object to the inclusion of manslaughter and criminally-negligent homicide.

Implicit in the definitions of manslaughter and criminally-negligent homicide is the concept that the actor must not have acted intentionally or knowingly; the actor must not have intended the resulting death or been aware that a death was reasonably certain to occur. *See* Tex. Penal Code Ann. § 6.03(a–b). Accordingly, both offenses are lesser felonies. *See* Tex. Penal Code. Ann. §§ 19.02(c) (murder is first-degree felony), 19.04(b) (manslaughter is second-degree felony), 19.05(b) (criminally-negligent homicide is state jail felony). Having found appellant guilty of murder, the jury assessed his punishment at 30-years imprisonment. If the jury instead had returned a guilty verdict on manslaughter, it may have assessed fewer than thirty years, down to the minimum sentence of 25-years imprisonment for appellant as a habitual felon. *See* Tex. Penal Code. Ann. § 12.42(d) (punishment range for habitual felony offender is 25 to 99 years). More significantly, if the jury had returned a guilty verdict on criminally-negligent homicide instead of on murder or manslaughter, appellant would not have even been subject to punishment as a habitual felon and could not have received 30-years imprisonment. *See* Tex. Penal Code. Ann. §§ 12.35(a) (punishment range for state jail felony is 180 days to two years), 12.42(d) (habitual-felon statute does not apply to state jail felony).

***4** As for the evidence, certainly, there was no real dispute that appellant shot and caused the death of Barriere. Essentially, "the sole issue at trial concerned appellant's intent." *See Lugo*, 667 S.W.2d at 149. During closing, the State certainly focused the jury on this contested element, stating that it had to prove "what's in [appellant's] mind. Did he intend that this happen?" Defense counsel also informed the jury that appellant's intent was the key element:

> So when you deliberate about your independent verdict, if you do not believe the State has proven that Vincent Stredic intentionally caused the death of Christopher Barriere, you have found him not guilty of murder; and you then must decide whether this accident was manslaughter or criminally negligent homicide. And I would submit to you that that's where your focus is going to be during your deliberation.

The State discussed various evidence in its effort to prove

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appellant's intent, including the surveillance video from the gas station, testimony from Rodrick Harris, and appellant's video statement. In addition, however, the State specifically highlighted appellant's testimony on the stand for the jury, comparing it to what he said and did not say in his video statement and arguing that his trial testimony was concocted:

> Basically the testimony that he gave to you on the stand that he's had a year to think about now, he had that opportunity to tell them at that time; but he doesn't. I can tell you exactly why he doesn't. Because at that point he hasn't had a chance to really formulate his story.

Here, appellant's disputed testimony provided to the jury by transcript concerned whether appellant "felt threatened" by Barriere and Harris. The trial court provided approximately four pages of transcript excerpts to the jury. In relevant part, appellant's testimony on direct indicated that Barriere took a couple of steps toward appellant, appellant was afraid, and appellant raised the shotgun "just to scare" and "back [Barriere] up." Appellant's testimony on cross indicated that Harris told appellant "you're not going to leave me here" and charged appellant; appellant was holding the gun but pointed it up in the air, not at Harris. Appellant's testimony on re-direct indicated he was scared when Barriere was coming towards appellant and he thought Barriere could seriously injure or even kill him. Appellant's testimony on re-cross indicated that when the "gun went off the first time," Harris was actually walking away from appellant; appellant was not trying to defend himself with the gun, and it "just accidentally went off." Appellant's testimony on further re-direct indicated he was trying to defend himself by raising the gun and showing it to Barriere and Harris.

Ordinarily, the jury is not allowed to rehear or reconsider any testimonial evidence. *Cf.* Tex. Code Crim. Proc. Ann. art. 36.25. However, as here, the jury may properly ask the trial court for a readback of witness testimony to help it resolve its factual dispute. *See* Tex. Code of Crim. Proc. Ann. art. 36.28; *Thomas*, 505 S.W.3d at 923. There is no question that the jury faced disagreement regarding what appellant's trial testimony revealed about his intent, which is a question of fact. *See Smith v. State*, 965 S.W.2d 509, 518 (Tex. Crim. App. 1998). There is no question that the jury requested the trial court's help in resolving its dispute. There is also no question that, if the jury was going to return a verdict of guilty, determining appellant's culpable mental state at the time of the shooting was critical to the jury's finding him guilty of murder versus a lesser-included offense of manslaughter or criminally-negligent homicide.

***5** The particular question we face is whether the trial court's answering the jury's disagreement about witness testimony by providing a written transcript that the jury was able to read during deliberations commented on the weight of the evidence and harmed appellant. We acknowledge that we would not be facing this question if the trial court had complied with article 36.28 by providing oral readback of appellant's disputed testimony. But the trial court here violated article 36.28 by sending excerpts of the court reporter's notes back to the jury room and in doing so clearly abused its discretion.

Instead of providing the jury with it once by oral readback in the courtroom, the trial court treated appellant's disputed trial testimony as an admitted written exhibit so that it was available to be passed among the jury in the jury room, and to be read and considered without time or other restraint. *See* Tex. Code Crim. Proc. Ann. art. 36.25 ("There shall be furnished to the jury upon its request any exhibits admitted as evidence in the case."). Although bringing out the jury and providing it with one-time oral readback of disputed testimonial evidence properly strikes a balance between the trial court's commenting on the weight of the evidence with the need to provide the jury with the means to resolve any factual disputes, *Thomas*, 505 S.W.3d at 923, we conclude that the provision of excerpts from the court reporter's notes in transcript form concerning an essential element of the alleged offenses to be accessed and considered as written evidence in the jury room, over objection, amounted to an impermissible comment on its importance by the trial court and unfairly tipped that balance in favor of the State (and the highest degree of offense, murder) in appellant's case. *See* Tex. Code Crim. Proc. Ann. art. 38.05 ("In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.").[4]

[4] The authority "to the contrary" on which the dissent relies does not control or carry the day in appellant's particular case. None of those cases involved circumstances in which an appellant timely raised a "specific legal objection ... that [providing the disputed testimony in transcript form] is a comment on the weight of the evidence by the Court," like appellant did here. None of those cases involved the particular highlighting of an appellant's own trial testimony—regarding whether he possessed the requisite intent to have committed murder as opposed to a lesser-included offense—at issue here.
Miller v. State involved a bill-of-exception procedure that no longer exists, and there is no discussion of error

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preservation of any statutory violation. *Miller*'s discussion of harm consisted of a conclusory determination that the defendants had not met their burden to show "some injury to themselves by said action of the court." 128 Tex.Crim. 129, 79 S.W.2d 328, 330 (Tex. Crim. App. 1935); *see also Jones v. State*, 402 S.W.2d 191, 194 (Tex. Crim. App. 1966) (citing *Miller* for same). In *Higdon v. State*, 764 S.W.2d 308, 310 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd), the appellant waived any error in the trial court's article 36.28 procedure at the time the transcript in question was offered to the jury. Moreover, in *Higdon*, the appellant was not prejudiced when he also "acquiesced" to the trial court's sending his own trial testimony to the jury in transcript form.

***6** This is especially the case when appellant's testimony indicated he could not maintain a consistent story about what happened and what he felt during the incident, *i.e.*, his culpable mental state. Instead of resolving its disagreement over appellant's testimony based on listening to it being read back orally one time in the courtroom, the jury was able to (re)read and (re)consider his conflicting testimony about what was "in his mind"—in writing, in the jury room, as much as it may have wanted. In appellant's case, when the State expressly attacked and described appellant's trial testimony concerning the sole issue in the case as "formulated," or in other words, a lie, this was not an insignificant error.[5] Additionally, in appellant's case, the jury's determination of this sole issue meant a sentence of 30 years instead of as few as 180 days.

[5] We, of course, are not saying that a trial court's provision of disputed trial testimony to the jury in transcript form in violation of article 36.28 could never be harmless.

Without invading the role of the jury, we can never know for sure what influenced this jury in making its verdict, given the almost impenetrable wall surrounding deliberations. *See* Tex. R. Evid. 606(b). Under these circumstances, based on our review of the whole record, we are not convinced that the trial court's actions did not influence the jury's verdict or only had but very slight effect. *See Kotteakos*, 328 U.S. at 764, 66 S.Ct. 1239. We "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *See id.* at 765, 66 S.Ct. 1239. Instead, we harbor "grave doubts" that this error substantially influenced the jury's decision to find appellant guilty of murder instead of a lesser-included offense, and we cannot disregard it.[6] *See id.*

[6] The dissent argues that appellant was not harmed because the content of the testimony sent back in transcript form was the same as what would have been read to the jury if the trial court had complied with article 36.28. This position effectively nullifies the legislature's plain, unambiguous intent in passing not only article 36.28, but also article 36.25, regarding the authorized methods available to the trial court to provide evidence to a deliberating jury. The legislature only allows the trial court to provide a deliberating jury with requested admitted exhibits and with readback of disputed testimony.
The dissent further argues that even if a written format emphasized the testimony more than an oral format, appellant was not harmed because testimony from both the State's and his trial court's examination of him was sent back to the jury. While the testimony provided was not one-sided in the sense that it was not just elicited by the State, it was one-sided in that it involved appellant's impeachment of himself as to his culpable mental state during the shooting, which favored the State. The undue emphasis was of evidence clearly detrimental to appellant.
Finally, the dissent asserts there was other evidence to support murderous intent and the State focused on appellant's actions in its closing, so that the trial court's conduct can be disregarded as a procedural irregularity. For the reasons expressed above, we disagree. While the evidence may have been legally sufficient to support a murder conviction, the trial court's improper highlighting of appellant's conflicting trial testimony regarding his culpable mental state while the jury was deliberating that sole issue (without any instruction that the trial court was not in fact emphasizing appellant's testimony to the jury) had more than a slight effect. *See Kotteakos*, 328 U.S. at 765, 66 S.Ct. 1239 ("The inquiry cannot be merely whether there was enough to support the result....").

Therefore, after granting rehearing on our own motion, we sustain appellant's first issue, reverse the trial court's judgment, and remand the case for further proceedings. *See* Tex. R. App. P. 43.2(d). Appellant's motion for en banc reconsideration is denied as moot.

***7** In addition to the issue of the unconstitutionality of section 133.058(a) with regard to the consolidated court cost, appellant argued issues that the evidence was insufficient to support the punishment enhancement for burglary of a habitation and the unconstitutionality of the retention by Harris County of a ten-percent service fee also under section 133.058(a) of the jury-reimbursement and indigent-defense fees. Because these issues would not afford appellant any greater relief, we need not reach them. *See* Tex. R. App. P. 47.1.

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(Zimmerer, J., concurring)

(Wise, J., dissenting).

CONCURRING OPINION ON REHEARING

Jerry Zimmerer, Justice, concurring.

I join the new majority in full and write separately to address the effect of the error on appellant's substantial rights that may not be disregarded pursuant to Texas Rule of Appellate Procedure 44.2(b).

It is difficult to imagine how a convicted individual's own words being used against them in a court of law is ever harmful. After all, it is the role of the advocate to call out the inconsistencies of the accused to prove their guilt. But this is not the role of the trial court. The court must ensure impartiality in the proceedings and follow the laws as given. This includes compliance with Article 36.28 of the Code of Criminal Procedure. Because I conclude this error affected appellant's substantial rights, I now join the new majority opinion, and also write separately.

Background

This case is back on reconsideration; the facts sufficiently described in the original opinion and again in the new majority and dissent. I shall not repeat them here.

Analysis

The majority and dissent both cite *Thomas v. State*, which states, "[T]he purpose of Article 36.28 is 'to balance our concern that the trial court not comment on the evidence with the need to provide the jury with the means to resolve any factual disputes it may have.' " 505 S.W.3d 916, 923 (Tex. Crim. App. 2016) (quoting *Howell v. State*, 175 S.W.3d 786, 790 (Tex. Crim. App. 2005)).

The dissent suggests, "the trial court did not unduly emphasize the evidence" that "the majority fails to consider the entire record in conducting its harm analysis," and there is no "authority holding that the method of communicating evidence to the jury during deliberations—written transcript rather than oral readback—amount[s] to undue emphasis of the testimony sufficient to undermine the jury's verdict."

Violations of Article 36.28 as Undue Influence

The Court of Criminal Appeals in *Garrett v. State* addressed the danger of undue influence when a transcript of testimony is allowed to go back with the jury during deliberations. 658 S.W.2d 592, 594 (Tex. Crim. App. 1983). In addressing the difference between a permitted use of a written transcript being reviewed by a jury during trial playback of poor audio recordings, and comparing that to the same transcript going back to the jury during deliberations the court expressed concerns of the "danger" of the jury having the testimony before them during deliberations as both a violation of article 36.28 and the jury being, presumably, "unduly influenced" by it. *See id.* "Since the transcript was not introduced and not available during jury deliberations, there was no danger of the jury having the evidence before them during deliberations in violation of Art. 36.28, V.A.C.C.P., and thereby being unduly influenced by it." *Id.*

Transcript as Bolstering

***8** The Court of Criminal Appeals was clear in a similar case in which it considered a written transcript as bolstering of testimony. In *Lewis*, the court stated, "We do not approve the State's offer of its transcribed version of the taped conversation. After all, the tape itself was simply corroborative of [the witness's] testimony. Technical imperfections in the reproduction of the conversation did not authorize the State to submit its version in written form and thereby make the written transcript available to the jury during its deliberations. Art. 36.25, V.A.C.C.P. This was, in essence, bolstering

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[the witness's] version of the conversation." *Lewis v. State*, 529 S.W.2d 533, 535 n.1 (Tex. Crim. App. 1975).

Harm Analysis

As pointed out by the dissent, there remains a question of harm. In a 1935 case, a transcript of appellant's testimony given during the examining trial was permitted to go back to a jury. The Court of Criminal Appeals held, "While the matter may not have been exactly regular, yet no injury is shown to have resulted to the appellant." *Miller v. State*, 128 Tex.Crim. 129, 79 S.W.2d 328, 330 (Tex. Crim. App. 1935).

"The proper inquiry is 'whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' " *Thomas*, 505 S.W.3d at 926 (quoting *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). "On the other hand, if the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *Id.* at 926.

In *Thomas*, the question was between what was read and not read to the jury in response to the jury asking for the transcript. The court did not focus on the variance to determine harm. "[T]he harm analysis should not hinge solely on the lack of contradiction[.]" *Id.* at 927. Rather "a proper harm analysis requires a review of the entire record, including the weight of the evidence of [the defendant's] guilt, in order to determine whether the trial court's [error] affected the defendant's substantial rights." *Id.* at 927. "In assessing the likelihood that the jury's decision was adversely affected by the error, the reviewing court should consider all of the testimony and physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case, and closing arguments." *Id.* at 927. "If, after a review of the record as a whole, the appellate court can say that it 'has fair assurance that the error did not influence the jury, or had but a slight effect,' then the error is harmless." *Id.* at 927.

Conclusion

It is easy for anyone who has ever argued with a close friend or spouse to recall the hurt when one's own words were selectively recalled, yet this is exactly what the trial court did in this case; bolstering selective portions of appellant's testimony sent back during jury deliberation. The specific testimony not only related directly to a variance of appellant's prior testimony, but it appears to be the critical testimony upon which the appellant was convicted of the aggravating factor.

Under the system of analysis described by the Court of Criminal Appeals, I conclude the "weight of the evidence" against appellant was established by this testimony, and that the "nature of the evidence" was the "principle support" of the verdict. Accordingly, this appellate court cannot say that it has "fair assurance the error did not influence the jury, or had but a slight effect." *See Thomas*, 505 S.W.3d at 926. Taken in conjunction with the fact the trial court acted without due regard for the law, even in light of direct objection, gives great pause for the apparent lack of guiding principles upon which our system of jurisprudence relies. For these reasons I join the majority opinion and concur with the judgment to remand for a new trial.

DISSENTING OPINION ON REHEARING

Ken Wise, Justice, dissenting.

***9** Without question the trial court made a very basic error, but I disagree with the majority's conclusion that the error in this murder case was harmful. Appellant does not contend that the transcript of testimony provided to the jury was erroneous, incomplete, or otherwise improper. The trial court did not unduly emphasize the evidence by simply giving the jury what it asked for. The majority fails to consider the entire record in conducting its harm analysis. For these reasons, I respectfully dissent.

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Analysis

"[T]he purpose of Article 36.28 is 'to balance our concern that the trial court not comment on the evidence with the need to provide the jury with the means to resolve any factual disputes it may have.' " *Thomas v. State*, 505 S.W.3d 916, 923 (Tex. Crim. App. 2016) (quoting *Howell v. State*, 175 S.W.3d 786, 790 (Tex. Crim. App. 2005)). "An appellate court should not disturb a trial court judge's decision under Article 36.28 unless a clear abuse of discretion and harm are shown." *Id.*

Error under Article 36.28 is non-constitutional and subject to a harm analysis under Rule 44.2(b). *Id.* at 924–25; *see* Tex. R. App. P. 44.2(b). Therefore, we must disregard the error if it does not affect appellant's substantial rights. *See* Tex. R. App. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Thomas*, 505 S.W.3d at 926 (quoting *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). Thus, we must ask whether the error itself had a substantial influence on the verdict. *See id.* A proper harm analysis requires a review of the entire record, including the weight of the evidence of the defendant's guilt. *Id.* at 927. And, we must consider the character of the error. *Id.*

Appellant does not contest that Article 36.28 applied or that the jury disagreed about the testimony. Appellant does not contend that the jury required additional or less testimony to resolve its disagreement. Nor does appellant dispute the content or accuracy of the transcripts. Indeed, appellant had "[n]o objection to the content that will be provided in response to the jury's question." Rather, appellant argues that the jury's review of the testimony in written form "may have substantially swayed the jury to believe that Mr. Stredic's shooting of Mr. Barriere was intentional or knowing." Appellant contends, "If not for the emphasis on this testimony, the jury may quite possibly have found Mr. Stredic guilty of only manslaughter or criminally negligent homicide."

Here, it was the jury—not the trial court—that emphasized the importance of the disputed testimony by requesting the court reporter's notes. It was the jury that faced disagreement regarding what appellant's testimony revealed about his intent. Judging the facts, believing or disbelieving witness testimony, and resolving conflicts in the evidence all fall squarely and exclusively within the role of the jury as fact finder. *Jackson v. State*, 105 S.W.3d 321, 327 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). Accordingly, the jury properly asked the trial court to help it resolve a factual dispute. *See* Tex. Code Crim. Proc. art. 36.28; *Thomas*, 505 S.W.3d at 923.

***10** The jury received the same excerpts of appellant's testimony that properly would have been read aloud. The majority cites no authority holding that the method of communicating evidence to the jury during deliberations—written transcript rather than oral readback—amounted to undue emphasis of the testimony sufficient to undermine the jury's verdict. The only Texas authority is to the contrary. *See Miller v. State*, 128 Tex.Crim. 129, 79 S.W.2d 328, 330 (1935) (regarding predecessor statute, "The mere fact that the court at the request of the jury permitted the [trial] transcript to go into the jury room to be read by the jury themselves would in and of itself not be reversible error, unless the appellants could show some injury to themselves by said action of the court."); *Higdon v. State*, 764 S.W.2d 308, 310 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (holding that the appellant was not harmed when the trial court sent a particular witness's testimony to the jury in the form of a transcript in light of the fact that the trial court also sent transcripts of other witness testimony to the jury); *cf. Jones v. State*, 402 S.W.2d 191, 193–94 (Tex. Crim. App. 1966) (noting that the trial court answered the jury's questions about how the witnesses testified in written form rather than reading aloud testimony in open court; reasoning that the court's action was "nothing more than furnishing the jury with certain testimony," that the trial court's memoranda were accurate, and "[w]hile the testimony was not read to the jury in open court, as provided by the statutes, there is no showing of injury to appellant as a result of such failure").

Even if providing the testimony in written form emphasized it more than orally reading it to the jury, the emphasis reached all of appellant's testimony about whether he felt threatened. The transcripts included appellant's testimony as elicited by both his trial counsel and the State. Thus, any emphasis was not one-sided such that the trial court would have been unduly emphasizing the State's evidence. *See Higdon*, 764 S.W.2d at 310 ("Because the trial court treated testimony both beneficial and adverse to the appellant in a similar manner, we cannot find, as appellant suggests, that the trial court's unorthodox methods [of giving trial transcripts to the jury during deliberations] constituted unfair bolstering of testimony prejudicial to him."). Again, appellant conceded that he had no objection to the content of the transcripts.

Moreover, the transcripts did not comprise all of the evidence from which the jury could have reasonably inferred that appellant's shooting Barriere was intentional or knowing. In addition to testimony from appellant, the jury heard from six State's witnesses, including the

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officer dispatched to the scene, the assigned crime scene investigator, a forensic multimedia analyst, the assigned homicide detective, the assigned medical examiner, and an eyewitness regarding appellant's words, acts, and conduct before, during, and after his shooting Barriere. The jury also saw surveillance video and still shots from the gas station, an audio recording of the 9-1-1 call, appellant's video statement, and the autopsy report and photographs.

During closing, the State did not unduly highlight appellant's trial testimony regarding his intent. Instead, the State focused on appellant's actions:

> So that leaves us with that last element. Did unlawfully, intentionally and knowingly. We talked about during voir dire how we prove intent in a case, and it's not the defendant's sitting there professing exactly what he intended or what he knew was going to happen.
>
> We talked about how you can form—you can infer it from a person's words, their actions, the circumstances surrounding the event. That's the sort of thing that we use to make a determination on what a person's intent is. And I think the defendant's actions in this case, his actions both before, during and after the incident show exactly what he intended on that night.

In sum, the majority does not properly consider the character of the error—a procedural irregularity—in connection with the entire record and other evidence of guilt.

Conclusion

After reviewing the record as whole, I am fairly assured that any error from providing the jury with written transcripts—rather than reading the transcripts aloud—did not influence the jury or had but a slight effect in this case, and that appellant's substantial rights were not affected. *See Thomas*, 505 S.W.3d at 927. Because the majority holds otherwise, I dissent to the majority's reversal of this murder conviction.

SUPPLEMENTAL MAJORITY OPINION ON REHEARING

Charles A. Spain Justice

Motion for Rehearing Granted, Relief Denied, and Supplemental Majority Opinion on Rehearing filed September 29, 2020.

The State filed a motion for rehearing contending this court did not address its arguments that (1) appellant did not preserve error and (2) the Code of Criminal Procedure allows the State to act unless the Code specifically prohibits that action. We grant the motion for rehearing to consider these two issues.

The State first argues that appellant did not preserve his argument that providing the jury with a written transcript of disputed testimony violated Code of Criminal Procedure article 36.28. Appellant made the following statements to the trial court:

> The position of the Defense is that it's inappropriate to provide a written transcript of the testimony. We have no objection to a readback of the particular testimony that's been selected by the Court, but we believe that providing a written transcript creates a greater emphasis and places more importance on that particular testimony since the jurors must recall from their own from being in trial what they heard as far as the other issues are concerned.

While appellant does not specifically mention article 36.28, this specific ground is certainly "apparent from the context" of appellant's remarks that he is discussing matters within the article's purview. *See* Tex. R. App. P. 33.1(a)(1)(A). The State certainly understood at trial, as it responded with a discussion of the scope of article 36.28. While the high court's interpretation of preservation of appellate complaints in criminal proceedings is undeniably stricter than in civil proceedings, Rule 33.1(a)(1)(A)'s "apparent from the context" language still applies.

We overrule the State's first issue that appellant did not preserve his complaint.

The State's second issue is that this court failed to address the following argument raised by the State: "The appellant correctly notes that Article 36.28 does not authorize trial courts to [give] transcripts to jurors. However, neither does Article 36.28 prohibit such a practice. It is silent on the matter entirely." The State effectively argues that any practice not specifically prohibited by the Code of Criminal Procedure must be allowed. The sole case the State cites in support of this

argument does not contain any such sweeping statement, nor does it address the Code of Criminal Procedure at all. *See Milton v. State*, 572 S.W.3d 234 (Tex. Crim. App. 2019).[1]

[1] The State also contends this court cited no case authority for our interpretation of article 36.28. The only potentially relevant authority we have located, discussed at various junctures by both parties, is *Garrett v. State*. 658 S.W.2d 592 (Tex. Crim. App. 1983). In *Garrett*, the Court of Criminal Appeals considered whether the use of a written transcript was permissible as an aid to the jury during trial while it listened to a tape-recorded conversation involving appellant. *See id.* at 593–94. This is a different issue from the one we face here. As *Garrett* does not present or decide the issue of whether a written transcript of testimony about which the jury disagrees is allowed in the jury room during deliberations under article 36.28, we conclude it does not directly control our disposition. *See id.* However, we note language in *Garrett* supports our conclusion that providing a court reporter's transcript of disputed testimony during deliberations violates article 36.28. *See id.* at 594 ("Since the transcript was not introduced and not available during jury deliberations, there was no danger of the jury having the evidence before them during deliberations in violation of Art. 36.28, V.A.C.C.P., and thereby being unduly influenced by it."); *see also Stredic v. State*, No. 14-18-00162-CR, 2020 WL 4689854, at *7 (Tex. App.—Houston [14th Dist.] Aug. 13, 2020, no pet. h.) (Zimmerer, J., concurring) (discussing *Garrett*).

Even if the State's view of its powers under the Code of Criminal Procedure were correct, it would require an implausible reading of article 36.28 to apply it here. Article 36.28 sets forth the procedure that applies "if the jury disagree as to the statement of any witness." Tex. Code Crim. Proc. Ann. art. 36.28. The statute then provides that, in such circumstances, the jury "may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute, and no other" or, in the absence of such notes, hear from the witness again. *Id.* While the statute does not spell out all of the potential ways the jury is *not* allowed to review the testimony of a witness, it is not difficult to connect the dots and conclude that procedures not authorized by the plain language of the article are prohibited. *See id.* Indeed, adopting the State's theory would render article 36.28 a nullity, a toothless provision merely containing two examples of ways in which testimony possibly might be provided to the jury, as opposed to delineating the only two ways the jury is permitted to receive it. *See id.* In sum, the State would have us read article 36.28 in such a way as to violate the principal canon of statutory construction: to give effect to the plain meaning of the statute. *See Boykin v. State*, 818 S.W.2d 782, 786 (Tex. Crim. App. 1991) (describing this interpretive mode as "of ancient origin").[2]

[2] We note that the Code Construction Act does not apply to Code of Criminal Procedure article 36.28. By its terms, the Code Construction Act applies to "each code enacted by the 60th or a subsequent legislature as part of the state's continuing statutory revision program" and "each amendment, repeal, revision, and reenactment of a code or code provision by the 60th or a subsequent legislature." Tex. Gov't Code Ann § 311.002(1), (2). Article 36.28, however, has not been addressed since the 59th Legislature. Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 1, art. 36.28, [2] 1965 Tex. Gen. Laws 317, 459 (codified at Tex. Code Crim. Proc. Ann. art. 36.28). The statutory-construction provision in the Code of Criminal Procedure, article 1.26, does not give any guidance from the legislature applicable to this case: "The provisions of this Code shall be liberally construed, so as to attain the objects intended by the Legislature: The prevention, suppression and punishment of crime." Tex. Code Crim. Proc. Ann. art. 1.26.

We overrule issue two.

Having granted the motion for rehearing and considered and overruled the State's issues, we deny the State's requested relief. The court's previously issued opinions and August 13, 2020 judgment on rehearing remain unchanged.

All Citations

--- S.W.3d ----, 2020 WL 4689854

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Appendix B

***Stredic v. State*, No. 14-18-00162-CR, 2019 WL 6320220 (Tex. App.—Houston [14th Dist.] November 26, 2019)(withdrawn).**

2019 WL 6320220
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas, Houston (14th Dist.).

Vincent Depaul STREDIC, Appellant
v.
The STATE of Texas, Appellee

NO. 14-18-00162-CR

Opinions filed November 26, 2019

Synopsis
Background: Defendant was convicted in the 177th District Court, Harris County, of murder. Defendant appealed.

Holdings: The Court of Appeals, Wise, J., held that:

any error from providing the jury with written transcripts of defendant's trial testimony did not affect defendant's substantial rights;

evidence was sufficient to support habitual offender sentence enhancement; and

statute authorizing retention of service fees by municipality or county did not on its face violate State Constitution's separation-of-powers provision.

Affirmed.

Spain, J., filed dissenting opinion.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

On Appeal from the 177th District Court, Harris County, Texas, Trial Court Cause No. 1530454

Attorneys and Law Firms

Clinton Morgan, Kim K. Ogg, Houston, Eric Kugler, for Appellee.

Theodore Lee Wood, Austin, for Appellant.

Panel consists of Justices Wise, Zimmerer, and Spain.

OPINION

Ken Wise, Justice

***1** A jury found Vincent Depaul Stredic guilty of murder, found two punishment enhancements true, and assessed punishment at thirty years' confinement. Appellant contends that: (1) the trial court erred by providing the jury with a written transcript of disputed testimony during deliberations; (2) the evidence is insufficient to support one of the punishment enhancements; and (3) the statute that authorizes Harris County to retain a ten-percent service fee for collecting certain court costs is unconstitutional. We affirm.

I. BACKGROUND

Appellant drove some friends, including the complainant Christopher Joel Barriere and Rodrick Harris, to a gas station. Appellant went inside to make a purchase. When he returned, Harris was smoking PCP inside appellant's car. Appellant told Barriere and Harris to get out of his car because he did not want to be around the PCP. Barriere and Harris refused to get out, so appellant opened his trunk and pulled out a loaded shotgun.

At some point during the argument, Barriere and Harris exited the car. Barriere walked toward appellant. Appellant raised his gun. The gun discharged, hitting Barriere and killing him. When the gun discharged, Harris was walking away from appellant. According to appellant's testimony at trial, he raised the gun just to scare Barriere and make sure no one got back in the car. Appellant claimed that "this was an accident." After appellant shot Barriere, Harris charged at appellant. Appellant pointed the gun at Harris, and Harris "stopped coming at" appellant. Then appellant drove away.

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According to appellant, when he returned to the scene, he was in "panic mode." When Harris "came at [appellant] again," appellant also shot Harris.

Appellant was indicted and tried for the murder of Barriere. Appellant's indictment contained two enhancement paragraphs, including that appellant was previously convicted on February 5, 1999, of felony burglary of a habitation.

At trial, the jury charge included instructions for murder and the lesser-included offenses of manslaughter and criminally negligent homicide. Appellant's trial counsel urged the jury to consider criminally negligent homicide because the State failed to prove appellant's culpable mental state for murder.

During deliberations, the jury informed the trial court that it disagreed about appellant's testimony. The jury asked to "see the court reporter's notes when [appellant] was the witness, when the State Attorney was questioning him regarding his statement on if [appellant] felt threatened by ... Barriere and ... Harris." The trial court planned to respond: "The Court will provide you readback concerning the defendant and the statement in dispute by transcript."

Appellant objected to providing the jury with a written transcript under Article 36.28 of the Code of Criminal Procedure, arguing that the written transcript emphasized and placed more importance on the testimony. He argued that the trial court was commenting on the weight of the evidence. When the trial court asked whether there were any objections to the "content of the transcript," appellant responded: "No objection to the content that will be provided in response to the jury's question."

***2** The trial court provided approximately four pages of written transcript excerpts to the jury. In relevant part, appellant's testimony on direct indicated that Barriere took a couple of steps toward appellant and appellant was afraid. Appellant's testimony on cross indicated that Harris told appellant "you're not going to leave me here" and charged appellant. Appellant was holding the gun but pointed it up in the air, not at Harris. Appellant's testimony on re-direct indicated he was scared when Barriere was coming towards him. Appellant's testimony on re-cross indicated that when the "gun went off the first time," Harris was walking away from appellant; appellant was not trying to defend himself with the gun, and it "just accidentally went off." Appellant testified on further re-direct that he was trying to defend himself by raising the gun and showing it to Barriere and Harris.

The jury found appellant guilty of murder. During the punishment phase, the State proffered, and the trial court admitted, appellant's stipulation that certain State's exhibits "constitute true and correct evidence" and each exhibit "truthfully sets forth sentences and judgments for crimes for which I have been convicted." These exhibits included a judgment and sentence dated October 27, 1997, for felony burglary of a habitation, wherein appellant's sentence was probated. The evidence included a judgment revoking probation dated February 5, 1999, which revoked appellant's probation for the 1997 burglary, and wherein appellant was sentenced to five years' confinement. The evidence included another judgment for felony possession of a controlled substance, as alleged in the indictment. The jury found both enhancement paragraphs true and assessed appellant's punishment at thirty years' confinement.

In the judgment, the trial court ordered appellant to pay court costs. The record includes a bill of costs, which includes an assessment of $133 for consolidated court costs, $4 for the jury reimbursement fee, and $2 for the support of indigent defense.

Appellant timely appealed.

II. ARTICLE 36.28

In his first issue, appellant contends that the trial court erred by providing the deliberating jury with a written transcript of testimony from the trial. Appellant contends that providing a written transcript to the jury, rather than providing an oral readback of testimony, violated Article 36.28, and this non-constitutional error was harmful. Assuming without deciding that the trial court erred, we hold that appellant was not harmed.

In full, Article 36.28 provides:

> In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute, and no other; but if there be no such reporter, or if his notes cannot be

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> read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as he can in the language used on the trial.

Tex. Code Crim. Proc. art. 36.28.

"The purpose of Article 36.28 is 'to balance our concern that the trial court not comment on the evidence with the need to provide the jury with the means to resolve any factual disputes it may have.' " *Thomas v. State*, 505 S.W.3d 916, 923 (Tex. Crim. App. 2016) (quoting *Howell v. State*, 175 S.W.3d 786, 790 (Tex. Crim. App. 2005)). "An appellate court should not disturb a trial court judge's decision under Article 36.28 unless a clear abuse of discretion and harm are shown." *Id.*

Error under Article 36.28 is non-constitutional and subject to a harm analysis under Rule 44.2(b). *Id.* at 924–25; *see* Tex. R. App. P. 44.2(b). Therefore, we must disregard the error if it does not affect appellant's substantial rights. *See* Tex. R. App. P. 44.2(b). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Thomas*, 505 S.W.3d at 926 (citing *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). Thus, we must ask whether the error itself had a substantial influence on the verdict. *See id.* A proper harm analysis requires a review of the entire record, including the weight of the evidence of the defendant's guilt. *Id.* at 927. And, we must consider the character of the error. *Id.*

***3** Appellant does not contest that Article 36.28 applied or that the jury disagreed about the testimony. Appellant does not contend that the jury required additional or less testimony to resolve its disagreement. Nor does appellant dispute the content or accuracy of the transcripts. Indeed, appellant had "[n]o objection to the content that will be provided in response to the jury's question." Rather, appellant argues that the jury's review of the testimony in written form "may have substantially swayed the jury to believe that Mr. Stredic's shooting of Mr. Barriere was intentional or knowing." Appellant contends, "If not for the emphasis on this testimony, the jury may quite possibly have found Mr. Stredic guilty of only manslaughter or criminally negligent homicide."

Here, it was the jury—not the trial court—that emphasized the importance of the disputed testimony by requesting the court reporter's notes. It was the jury that faced disagreement regarding what appellant's testimony revealed about his intent. Judging the facts, believing or disbelieving witness testimony, and resolving conflicts in the evidence all fall squarely and exclusively within the role of the jury as fact finder. *Jackson v. State*, 105 S.W.3d 321, 327 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). Accordingly, the jury properly asked the trial court to help it resolve a factual dispute. *See* Tex. Code Crim. Proc. art. 36.28; *Thomas*, 505 S.W.3d at 923.

The jury received in written form the same excerpts of appellant's testimony that properly would have been read aloud. Appellant cites no authority holding that the method of communicating evidence to the jury during deliberations—written transcript rather than oral readback—amounted to undue emphasis of the testimony sufficient to undermine the jury's verdict. The only Texas authority is to the contrary. *See Miller v. State*, 128 Tex. Crim. 129, 131–32, 79 S.W.2d 328, 330 (1935) (regarding predecessor statute, "The mere fact that the court at the request of the jury permitted the [trial] transcript to go into the jury room to be read by the jury themselves would in and of itself not be reversible error, unless the appellants could show some injury to themselves by said action of the court."); *Higdon v. State*, 764 S.W.2d 308, 310 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) (holding that the defendant was not harmed when the trial court sent a particular witness's testimony to the jury in the form of a transcript in light of the fact that the trial court also sent transcripts of other witness testimony to the jury); *cf. Jones v. State*, 402 S.W.2d 191, 193–94 (Tex. Crim. App. 1966) (noting that the trial court answered the jury's questions about how the witnesses testified in written form rather than reading aloud testimony in open court; reasoning that the court's action was "nothing more than furnishing the jury with certain testimony," that the trial court's memoranda were accurate, and "[w]hile the testimony was not read to the jury in open court, as provided by the statutes, there is no showing of injury to appellant as a result of such failure").

Even if providing the testimony in written form emphasized it more than orally reading it to the jury, the emphasis reached all of appellant's testimony about whether he felt threatened. The transcripts included appellant's testimony as elicited by both his trial counsel and the State. Thus, any emphasis was not one-sided such that the trial court would have been unduly emphasizing the State's evidence. *See Higdon*, 764 S.W.2d at 310 ("Because the trial court treated testimony both beneficial and adverse to the appellant in a similar manner, we cannot find, as appellant suggests, that the trial court's unorthodox methods [of giving trial transcripts to the jury during deliberations] constituted unfair bolstering of

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testimony prejudicial to him.").

***4** Moreover, the transcripts did not comprise all of the evidence from which the jury could have reasonably inferred that appellant's shooting Barriere was intentional or knowing. In addition to testimony from appellant, the jury heard from six State's witnesses, including the officer dispatched to the scene, a crime scene investigator, a forensic multimedia analyst, a homicide detective, a medical examiner, and an eyewitness regarding appellant's words, acts, and conduct before, during, and after his shooting Barriere. The jury also saw surveillance video and still shots from the gas station, an audio recording of the 9-1-1 call, a video of appellant's statement, and the autopsy report and photographs.

During closing, the State did not unduly highlight appellant's trial testimony regarding his intent. Instead, the State focused on appellant's actions:

> So that leaves us with that last element. Did unlawfully, intentionally and knowingly. We talked about during voir dire how we prove intent in a case, and it's not the defendant's sitting there professing exactly what he intended or what he knew was going to happen.
>
> We talked about how you can form—you can infer it from a person's words, their actions, the circumstances surrounding the event. That's the sort of thing that we use to make a determination on what a person's intent is. And I think the defendant's actions in this case, his actions both before, during and after the incident show exactly what he intended on that night.

After reviewing the record as a whole, we are fairly assured that any error from providing the jury with written transcripts—rather than reading the transcripts aloud—did not influence the jury or had but a slight effect and that appellant's substantial rights were not affected. *See Thomas*, 505 S.W.3d at 927. The alleged error was not harmful.

Appellant's first issue is overruled.

III. SUFFICIENCY OF EVIDENCE FOR ENHANCEMENT PARAGRAPH

In his second issue, appellant contends that the evidence is insufficient to support the jury's finding that he was convicted of felony burglary of a habitation on February 5, 1999, so the punishment range should have been for a repeat offender rather than a habitual offender.[1] Appellant argues that there is a distinction between a "conviction" and a "final conviction," the latter of which is required to enhance a sentence under the habitual offender statute. *See* Tex. Penal Code § 12.42(d). Appellant contends that the State alleged a "conviction" date of February 5, 1999, in the indictment although the State proved a "conviction" date of October 27, 1997. Thus, appellant contends that there was "a variance between the proof and the allegations as to the date" of the conviction, rendering the evidence insufficient.[2]

[1] Appellant does not challenge the jury's finding of true regarding the conviction for felony possession of a controlled substance.

[2] *See Roberson v. State*, 420 S.W.3d 832, 840–41 (Tex. Crim. App. 2013) (applying the immaterial variance doctrine to punishment enhancements alleged for purposes of habitual offender punishment under Section 12.42(d))

Appellant concedes that the 1997 conviction became final for purposes of enhancement on February 5, 1999, when his probation was revoked. *See Ex parte Pue*, 552 S.W.3d 226, 231 (Tex. Crim. App. 2018) (noting that a probated sentence becomes a final conviction for purposes of Section 12.42(d) when probation is revoked). Thus, for purposes of Section 12.42(d), appellant's "conviction" occurred on February 5, 1999. *See id.* The State properly alleged the date of the final conviction—here, February 5, 1999—in the enhancement paragraph of the indictment. *See Burton v. State*, 493 S.W.2d 837, 839–40 (Tex. Crim. App. 1973) (holding that the proper date to allege in an enhancement allegation is the date that the sentence was imposed after revocation of probation, rather than the date of the original judgment of conviction).

***5** The trial court admitted a judgment dated February 5, 1999, which revoked appellant's probation for the offense of burglary of a habitation. Thus, there was no variance between the allegation in the indictment and the proof in this case, and the evidence is sufficient.[3]

[3] Even if there were a variance, it would be immaterial and therefore not render the evidence insufficient because appellant was not prejudiced. *See Burton*, 493 S.W.2d at 839–40 (no reversible error when the State alleged the date of the original conviction, rather than the proper date of the imposition of the sentence following

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revocation of probation, because the defendant was not misled by the allegation); *Simmons v. State*, 288 S.W.3d 72, 80 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) ("A variance in dates of conviction is not fatal when there is no surprise or prejudice to the defendant."); *see also Wheatley v. State*, No. 14-09-00056-CR, 2010 WL 2332136, at *9–10 (Tex. App.—Houston [14th Dist.] June 10, 2010, no pet.) (mem. op., not designated for publication).

Appellant's second issue is overruled.

IV. COURT COSTS

In his related third and fourth issues, appellant brings a facial challenge to the constitutionality of Section 133.058(a) of the Local Government Code, which authorizes municipalities and counties to retain a ten-percent "service fee" for collecting court costs. Specifically, appellant challenges the constitutionality of the statute relating to the retention of a service fee for collecting the consolidated court cost (issue three) and the fees for jury reimbursement and support of indigent defense (issue four).

Whether a statute is facially unconstitutional is a question of law that we review de novo. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). We presume that the statute is valid and that the Legislature did not act unreasonably or arbitrarily. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002); *see also* Tex. Gov't Code § 311.021. The party challenging the statute has the burden to establish its unconstitutionality. *Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015).

In a facial challenge, the challenger must establish that "no set of circumstances exists under which the statute would be valid." *Id.* Because a facial challenge attacks a statute's validity in all circumstances, it is "the most difficult challenge to mount successfully." *See Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992).

The Texas Constitution guarantees separated powers among the three branches of government. *See* Tex. Const. art. II, § 1; *Salinas v. State*, 523 S.W.3d 103, 106 (Tex. Crim. App. 2017). When one branch of government assumes or is delegated a power more properly attached to another branch, that assumption or delegation of power violates the separation of powers. *Salinas*, 523 S.W.3d at 106–07. If a statute turns the courts into "tax gatherers," then the statute delegates to the courts a power more properly attached to the executive branch. *Id.* at 107.

"As this court recently concluded, two types of court-cost statutes pass constitutional muster: (1) statutes under which a court recoups expenditures necessary or incidental to criminal prosecutions; and (2) statutes providing for an allocation of the costs to be expended for any legitimate criminal justice purpose." *Johnson v. State*, 573 S.W.3d 328, 333–34 (Tex. App.—Houston [14th Dist.] 2019, pet. filed); *see Peraza*, 467 S.W.3d at 517–18.

***6** Section 133.058(a) provides: "Except as otherwise provided by this section, a municipality or county may retain 10 percent of the money collected from fees as a service fee for the collection if the municipality or county remits the remainder of the fees to the comptroller within the period prescribed by Section 133.055(a)." Tex. Loc. Gov't Code § 133.058(a); *see id.* § 133.003 (outlining "criminal fees" governed by Chapter 133). Essentially, this means that Harris County can retain ten percent of certain criminal fees as a service fee for collecting those fees for the State.

Appellant contends that the service fee violates the separation-of-powers provision of the Texas Constitution because Section 133.058(a) does not direct the fee to be spent for a legitimate criminal justice purpose. As appellant points out, Section 133.058(a) is silent regarding where the service fee proceeds are to be directed.[4]

[4] Appellant does not contend that the underlying statutes authorizing the consolidated court costs and jury reimbursement and indigent defense fees are unconstitutional.

However, the service fee authorized by Section 133.058(a) is to be retained by counties for "the collection" of fees, which includes collection of the criminal court costs outlined in Section 133.003. *See id.* § 133.058(a); *see also id.* § 133.003(1), (8), (10) (Chapter 133 applies to criminal fees for the consolidated fee, the jury reimbursement fee, and the indigent defense fee). Thus, the fees "are imposed by virtue of a defendant's conviction and thus are attendant to a criminal court proceeding." *See Johnson*, 573 S.W.3d at 339 (facially constitutional statute authorized certain officers of the court or a community supervision department to assess up to a $2 administrative fee for each transaction related to

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the collection of court fees or costs). The service fee authorized by Section 133.058(a) is a recoupment of criminal prosecution expenses. *See Moliere v. State*, 574 S.W.3d 21, 31–32 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd) (facially constitutional statute required defendant to pay a $40 service fee to the clerk of the court for clerical duties, including for taxing costs against the defendant).

Appellant has not demonstrated that Section 133.058(a) operates unconstitutionally in every instance. Therefore, we conclude that Section 133.058(a) is not facially unconstitutional.

Appellant's third and fourth issues are overruled.

V. CONCLUSION

Having overruled appellant's issues, we affirm the trial court's judgment.

(Spain, J., dissenting).

DISSENTING OPINION

Charles A. Spain, Justice, dissenting.

As judges, we often say our job is to follow the law. Here, over appellant's objection, the trial judge did not follow the law. Because this court concludes that the error was harmless, this court effectively becomes a "super legislator" and nullifies a provision of the Code of Criminal Procedure by holding there is no remedy for this trial judge's failure to follow the law.

This case reaches far beyond this individual appellant. It reaches into the process of the jury's deliberations, and it alters how the jury receives evidence. It reaches and disturbs the delicate balance between the trial judge who must not comment on the evidence and the jury which must discharge its responsibility to deliberate on that evidence. It reaches the independent duty of the trial judge to know and follow legislatively mandated criminal procedure. It reaches a defendant's right to have the trial judge follow that procedure and calls into question whether the Texas Rules of Appellate Procedure can abridge, enlarge, or modify the substantive rights of a litigant in the absence of express waiver.[1] It reaches the question whether a reviewing court can perform a traditional harm analysis when the trial judge, as the gatekeeper of the evidence, permits written testimony not allowed by statute to invade the province of the jury.

[1] *See* Tex. Gov't Code Ann. § 22.108(a).

***7** This is anything but some minor criminal case. This is about how the legislature instructs the courts to give evidence to the jury. This court seemingly acts like it does not matter whether the jury receives evidence delivered from the witness stand orally or in writing. I am not qualified as an expert to explain the process of how individual jurors hear and remember oral testimony versus also having a written transcription of that testimony during jury deliberations, but I know enough to understand that it most certainly makes a difference. However, my thoughts on that are irrelevant. Our system is that the jury has the responsibility to listen to the testimony as spoken by the witness on the stand and remember that testimony as best it can. And ever since the legislature adopted the Old Code in 1856, it has been the law that when such testimony is in dispute, the trial judge only can allow the jury to receive it again in oral form.[2] Even as courtroom technology has advanced over time, and the legislature in the 1950s amended the predecessor statute to account for the availability of court reporter's notes, the legislature did not change that the trial judge only can permit the jury to rehear disputed witness testimony, whether by oral readback of notes or by the witness herself recreating her testimony on the stand.

[2] 1856 Code of Criminal Procedure, 6th Leg., Adj. S., § 1, art. 615, 1856 Tex. Crim. Stat. 4, 117 ("If the Jury disagree as to the statement of any particular witness, they may, upon applying to the Court, have such witness again brought upon the stand, and he shall be directed by the Judge to detail his testimony in respect to the particular point of disagreement, and no other; and he shall be further instructed to make his statement in the language used upon his examination as nearly as he can."), *recodified and repealed by* 1879 Penal Code and Code of Criminal Procedure, 16th Leg., R.S., § 2, art. 697, § 3, 1879 Tex. Crim. Stat. n.p. (Penal Code pagination; act adopting both

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codes—as well as Revised Civil Statutes—is published as separate volume from session laws; section 1 of act is Penal Code, section 2 is Code of Criminal Procedure, and section 3 is repealer; *see* Act approved Apr. 26, 1879, 16th Leg., R.S., ch. 151, 1879 Tex. Gen. Laws 166), n.p. (Code of Criminal Procedure pagination), 83 ("If the jury disagree as to the statement of any particular witness, they may, upon applying to the court, have such witness again brought upon the stand, and he shall be directed by the judge to detail his testimony to the particular point of disagreement, and no other, and he shall be further instructed to make his statement in the language used upon his examination as nearly as he can."), 157 (repealer), *recodified and repealed by* 1895 Penal Code and Code of Criminal Procedure, 24th Leg., R.S., § 2, art. 735, § 3, 1895 Tex. Crim. Stat. 2 (Penal Code), 2 (Code of Criminal Procedure), 102 ("If the jury disagree as to the statement of any particular witness, they may, upon applying to the court, have such witness again brought upon the stand, and he shall be directed by the judge to detail his testimony to the particular point of disagreement, and no other, and he shall be further instructed to make his statement in the language used in his examination as nearly as he can."), 182 (repealer), *recodified by* 1911 Penal Code and Code of Criminal Procedure, 24th Leg., R.S., § 2, art. 755, § 3, 1911 Tex. Crim. Stat. n.p. (Penal Code), n.p. (Code of Criminal Procedure), 220 ("If the jury disagree as to the statement of any particular witness, they may, upon applying to the court, have such witness again brought upon the stand; and he shall be directed by the judge to detail his testimony to the particular point of disagreement, and no other, and he shall be further instructed to make his statement in the language used in his examination as nearly as he can.") (no repealer of 1895 Code of Criminal Procedure; *see Berry v. State*, 69 Tex.Crim. 602, 156 S.W. 626, 635 (1913)), *recodified and repealed by* 1925 Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 2, art. 678, § 3, art. 1, 1925 Tex. Crim. Stat. 2 (Penal Code), 2 (Code of Criminal Procedure), 104 ("If the jury disagree as to the statement of any witness, they may, upon applying to the court, have such witness recalled, and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, and as nearly as he can in the language he used on the trial."), 181 (repealer for both 1895 and 1911), *amended by* Act of May 19, 1953, 53d Leg., R.S., ch. 373, § 1, 1953 Tex. Gen. Laws 906, 906–07 ("In the trial of any criminal case in any District Court, Criminal District Court, or County Court, County Criminal Court, or County Court at Law, of this State, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness's testimony on the particular point in dispute, and no other; but if there be no such reporter, or if his notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the Judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as he can in the language used on the trial."), *recodified and repealed by* 1965 Code of Criminal Procedure of the State of Texas, 59th Leg., R.S., ch. 722, § 1, arts. 36.28, 54.02, secs. 1(a), 2, [2] 1965 Tex. Gen. Laws 317, 459 ("In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute, and no other; but if there be no such reporter, or if his notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as lie can in the language used on the trial."), 563 (repealer).

***8** With minimal analysis, this court primarily relies on a 1935 Court of Criminal Appeals case that does not control for several reasons: *Miller v. State*, 128 Tex.Crim. 129, 79 S.W.2d 328 (1935). *Miller* involved a bill-of-exception procedure that no longer exists.[3] There is no discussion of error preservation of any statutory violation. Indeed, the *Miller* court appears to on its own raise 1925 Code of Criminal Procedure article 678, a predecessor statute to article 36.28. *See* 79 S.W.2d at 330. *Miller* long predated *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), in which the Court of Criminal Appeals outlined the three classifications of rules contained in the Texas criminal adjudicatory system: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request. *Miller*'s discussion of harm consisted of a conclusory determination that the defendants had not met their burden to show "some injury to themselves by said action of the court." 79 S.W.2d at 330. But we are not to impose such a burden.[4] *Most significantly*, *Miller* does not even address the language of the statute at issue here.

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Article 678 as it existed in 1935 did not reference court reporter's notes at all. Such amendment did not take place until the 1950s.[5]

[3] The original bill-of-exception procedure was a since-repealed procedural requirement to cumulate alleged trial-court error for review by the Court of Criminal Appeals. 1925 Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 2, art. 667 ("Bill of exceptions.—The defendant, by himself or counsel, may tender his bill of exceptions to any decision, opinion, order or charge of the court or other proceedings in the case; and the judge shall sign such bill of exceptions, under the rules prescribed in civil suits, in order that such decision, opinion, order or charge may be revised upon appeal."), 1925 Tex. Crim. Stat. 2 (Penal Code), 2 (Code of Criminal Procedure), 102, *amended by* Act of May 25, 1953, 53d Leg., R.S., ch. 254, § 1, art. 667, 1953 Tex. Gen. Laws 670, 670 ("The defendant, by himself or counsel, may tender his bills of exception to any decision, opinion, order or charge of the court or other proceedings in the case; and the Judge shall sign such bills of exception, under the rules prescribed in civil suits, in order that such decision, opinion, order, or charge may be revised upon appeal. The bills of exception may be in narrative form or by questions and answers, and no particular form of words shall be required. Where the matter about which complaint is made and the trial court's ruling thereon reasonably appear from any formal or informal bill of exception, same shall be considered upon appeal, regardless of whether or not the bill of exception is multifarious or relates to more than one subject, complaint, or objection. Where the argument of State's counsel about which complaint is made in a bill of exception is manifestly improper, or violates some mandatory statute, or some new fact is thereby injected into the case, it shall not be necessary that the bill of exception negative that the argument was not invited, or in reply to argument of defendant or his counsel, or any other fact by which the argument complained of may have been authorized. If such matters exist, the trial court by qualification or otherwise, may require the bill of exception to reflect any reason whereby the argument complained of would not be error."), *recodified and repealed by* 1965 Code of Criminal Procedure of the State of Texas, 59th Leg., R.S., ch. 722, § 1, arts. 36.20 (codification) ("Bill of exceptions The defendant, by himself, or counsel, may tender his bills of exceptions to any decision, opinion, order or charge of the court or other proceedings in the case; and the judge shall sign such bills of exceptions, under the rules prescribed in Article 40.10. The bills of exception may be in narrative form or by questions and answers, and no particular form of words shall be required. Where the matter about which complaint is made and the trial court's ruling thereon reasonably appear from any formal or informal bill of exception, same shall be considered upon appeal, regardless of whether or not the bill of exception is multifarious or relates to more than one subject, complaint, or objection. Where the argument of State's counsel about which complaint is made in a bill of exception is manifestly improper, or violates some mandatory statute, or some new fact is thereby injected into the case, it shall not be necessary that the bill of exception negative that the argument was not invited, or in reply to argument of defendant or his counsel, or any other fact by which the argument complained of may have been authorized. If such matters exist, the trial court by qualification or otherwise, may require the bill of exception to reflect any reason whereby the argument complained of would not be error. The transcription of any evidence, testimony, or argument of State's counsel, with the objections made to such evidence, testimony, or argument, shall constitute an acceptable bill of exceptions under this Code."), 54.02, secs. 1(a), 2 (repealer), [2] 1965 Tex. Gen. Laws 317, 458, (recodification), 563 (repealer), *repealed by* Tex. R. App. P. 52, 11 Tex. Reg. 1939, 1998, 49 Tex. B.J. 558, 573 (Tex. Crim. App. Apr. 10, 1986, eff. Sept. 1, 1986); *see* Act of May 27, 1985, 69th Leg., R.S., ch. 685, § 4, 1985 Tex. Gen. Laws 2472, 2472–73 (authorizing promulgation of Texas Rules of Appellate Procedure and repeal of portions of Code of Criminal Procedure). Both former Texas Rule of Appellate Procedure 52(a) (Tex. & Crim. App. 1986) and current Texas Rule of Appellate Procedure 33.1(c) (Tex. & Tex. Crim. App. 1997) abolish formal exceptions to trial court rulings or orders.

A second form of bill-of-exception procedure appeared in the 1950s with the "new statement of facts" (what is now the "reporter's record") in criminal proceedings: Act of June 6, 1951, 52d Leg., R.S., ch. 465, § 2, 1951 Tex. Gen. Laws 819, 820, *amended by* Act of May 25, 1953, 53d Leg., R.S., ch. 254, § 1, art. 759A, 1953 Tex. Gen. Laws 670, 671, *codified and repealed by* 1965 Code of Criminal Procedure of the State of

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> Texas, 59th Leg., R.S., ch. 722, § 1, arts. 40.09(6), 54.02, § 1(a), [2] 1965 Tex. Gen. Laws 317, 478, 479–81 (codification), 563 (repealer), *amended by* Act of May 19, 1967, 60th Leg., R.S. ch. 659, § 27, art. 40.09(6), 1967 Tex. Gen. Laws 1732, 1742–43, *repealed by* Tex. R. App. P. 52(c), 11 Tex. Reg. 1939, 1998, 49 Tex. B.J. 558, 573, 593 (Tex. Crim. App. Apr. 10, 1986, eff. Sept. 1, 1986). The formal bill of exception survives today as Texas Rule of Appellate Procedure 33.2, which is the successor to the former 1986 Texas Rule of Appellate Procedure 52(c). Obviously, this second form of bill-of-exception procedure did not exist when *Miller* was decided in 1935.

[4] Even assuming a violation of this portion of article 36.28 is purely statutory such that Texas Rule of Appellate Procedure 44.2(b)'s substantial-rights standard of harm would apply, "no burden to show harm should be placed on the defendant who appeals." *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001).

[5] *See supra* note 2.

***9** In this case, appellant timely objected to the trial judge disregarding Code of Criminal Procedure article 36.28 by providing the jury with a written transcript of testimony. Given the high deference we as a society give to the jury, along with the almost impenetrable wall surrounding the jury's deliberations,[6] a meaningful harm analysis is impossible. By calling the trial judge's disregard of article 36.28 harmless error, this court effectively nullifies an act of the legislature.

[6] *See* Tex. R. Evid. 606(b).

Therefore, I respectfully dissent.

Article 36.28, entitled "Jury may have witness re-examined or testimony read," provides:

> In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute, and no other; but if there be no such reporter, or if his notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as he can in the language used on the trial.

Tex. Crim. Proc. Code Ann. art. 36.28. Article 36.28 is not ambiguous, nor does imposing its plain meaning impose an absurd result. The literal text of the statute is clear. The statute only authorizes oral readback of the court reporter's notes concerning the particular disputed testimony, or when there is no reporter or the reporter's notes cannot be read, for the witness to repeat such testimony on the stand. *Id.* The statute *does not* authorize the trial judge to provide the jury with a written transcript of the court reporter's notes, as was done here. *See id.* No statute or authority otherwise permits the trial judge to provide a deliberating jury with a written transcript of a witness's testimony.[7]

[7] By contrast, under Code of Criminal Procedure article 36.25, entitled "Written evidence," a deliberating jury can request and "shall be furnished" with "any exhibits admitted as evidence in the case." Tex. Code Crim. Proc. Ann. art. 36.25. But a court reporter's written notes of a witness's trial testimony do not fall within article 36.25.

Although the trial judge has discretion in determining whether a jury's inquiry about disputed testimony is proper and in deciding what sections of testimony will best answer the jury's inquiry, *see Thomas v. State*, 505 S.W.3d 916, 923 (Tex. Crim. App. 2016), there is no discretion with regard to how the trial judge is to provide the jury with that testimony. The trial judge *has no discretion* to provide anything but oral readback of such testimony or the witness to orally recreate her testimony as accurately as possible on the stand.[8] But this is precisely what the trial judge refused to do here, over appellant's timely objection that not doing so and instead providing written transcript excerpts would improperly comment on the weight of the evidence.

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[8] Likewise, in civil cases, trial judges provide juries that disagree as to witness testimony with either oral readback of the court reporter's notes of such testimony or with the witness herself to orally recreate her testimony as accurately as possible on the stand. Texas Rule of Civil Procedure 287 provides:

> If the jury disagree as to the statement of any witness, they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness' testimony on the point in dispute; but, if there be no such reporter, or if his notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as he can in the language used on the trial; and on their notifying the court that they disagree as to any portion of a deposition or other paper not permitted to be carried with them in their retirement, the court may, in like manner, permit such portion of said deposition or paper to be again read to the jury.

Tex. R. Civ. P. 287. If the jury tells the trial judge it disagrees as to a portion of a deposition or another paper not allowed to go back into the jury room, rule 287 further permits the trial judge to allow such item "to be again read to the jury." *Id.*

***10** Article 36.28's purpose is "to balance our concern that the trial court not comment on the evidence with the need to provide the jury with the means to resolve any factual disputes it may have." *Id.* The Court of Criminal Appeals has recognized that violations of the discretionary portions of the statute "may serve to bolster the State's case unnecessarily." *Id.* A litigant must preserve complaints related to such discretionary portions—whether the jury actually disagreed on testimony and to the scope of disputed testimony. *See id.* at 924 (citing *Hollins v. State*, 805 S.W.2d 475, 476 (Tex. Crim. App. 1991)).[9] We "apply the standard for assessing harm pursuant to [Texas Rule of Appellate Procedure] Rule 44.2(b)" to errors related to the discretionary portions of the statute. *Id.* at 925; *see* Tex. R. App. P. 44.2(b) ("Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). Reversal is therefore warranted if the error affected appellant's substantial rights. *See* Tex. R. App. P. 44.2(b); *Thomas*, 505 S.W.3d at 925–26.

[9] The discretionary portions of the statute are not at issue because appellant did not object in the trial court and does not challenge on appeal that the jury disagreed as to his testimony or the content of his testimony provided.

However, the Court of Criminal Appeals *has not* substantively addressed a violation of the nondiscretionary portion of article 36.28. The court has not yet categorized a litigant's right to only have the jury hear oral readback of the court reporter's notes of disputed witness testimony or disputed testimony repeated "verbatim" by the witness on the stand. In other words, it is not settled under *Marin* whether such an error needs to be preserved at trial to be raised on appeal. Nor has the Court of Criminal Appeals considered whether such error is purely statutory or perhaps may have some constitutional dimension that affects whether it should be subject to harmless-error analysis under rule 44.2(a). *See* Tex. R. App. P. 44.2(a) ("If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.").

I would conclude that a trial judge's violation of the nondiscretionary portion of article 36.28 should be characterized as at the least a category-two right under *Marin.* In so concluding, I am guided by recent holding of the Court of Criminal Appeals in *Proenza v. State*, 541 S.W.3d 786, 801 (Tex. Crim. App. 2017), "that the right to be tried in a proceeding devoid of improper judicial commentary is at least a category-two, waiver-only right." The *Proenza* court considered the language of article 38.05 and noted that the statute is couched in mandatory terms, directed at the trial judge herself, and creates a duty to act sua sponte or refrain sua sponte from a certain kind of action. *Id.* at 798; *see* Tex. Crim. Proc. Code art. 38.05 ("In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case."). The *Proenza* court highlighted the importance of the proper functioning of the criminal adjudicatory system and of protecting the perception of the trial judge's impartiality in front of the jury. 541 S.W.3d at 798–800. Similarly, because article 36.28 creates a duty on the trial judge to act by only providing the deliberating jury with oral readback of disputed witness testimony or witness recreation of disputed testimony, and because article 36.28 implicates the concern that the trial judge not comment on the evidence to the deliberating jury, I would

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conclude this is at least a right that is expressly waivable only and need not be preserved below. *See id.* at 797–801.

***11** With regard to harm, I do not believe that a trial judge's error in providing a deliberating jury with written witness testimony instead of proper oral readback or witness recreation of testimony lends itself to traditional harm analysis under rule 44.2. The only items that a deliberating jury generally takes back into the jury room to determine the defendant's guilt are the jury charge and its recollection of all the trial evidence. This does not mean the jury cannot on its own request certain evidence as so permitted. As for written evidence, "[t]here shall be furnished to the jury upon its request any exhibits admitted as evidence in the case." Tex. Code Crim. Proc. Ann. art. 36.25. As for witness testimony, only if the jury disagrees as to a witness statement and applies to the trial judge, may the jury have read back to it or rehear from the witness from the stand the appropriate point in dispute. *Id.* art. 36.28.

When a trial judge sends evidence back to the jury in an erroneous, unauthorized format, *e.g.*, a written transcript of witness testimony, arguably this presents a situation in which a reviewing court cannot reasonably determine whether such commingling of "valid" evidence (written exhibits and oral readback of disputed testimony properly provided under the Code of Criminal Procedure) and "invalid" evidence (written transcripts of disputed testimony improperly provided under the Code of Criminal Procedure) improperly bolstered the weight of certain testimony and therefore contributed to the jury's deliberation of the defendant's guilt.[10] And even then what would such a harm determination look like? Could it even be done without review of battling experts, who essentially would be tasked with invading the province of the jury and the sanctity of the jury room?[11]

[10] Perhaps an analogy in the civil context might be the erroneous commingling of valid and invalid liability theories in the jury charge of a civil case. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388–89 (Tex. 2000) ("[W]e hold that when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory.") (citing Tex. R. App. P. 44.1(a)).

[11] *See supra* note 6.

In any event, I respectfully disagree with the court's conclusion on harm in appellant's particular case. Appellant's testimony was confused and conflicting. In a case wherein the jury had to make its choice among murder, and the lesser-included offenses of manslaughter[12] and criminally negligent homicide,[13] the testimony concerned the most crucial element of the State's case. That is, appellant's culpable mental state during the incident in which he shot and killed his friend. The trial judge's improper comment on the weight of such evidence turned the tide against appellant and in favor of the State. To decide otherwise in this case effectively nullifies the legislature's intent to treat trial testimony differently and more restrictively than other trial evidence.

[12] If the jury instead had returned a guilty verdict on manslaughter, it may have assessed fewer than thirty years, down to the minimum sentence of 25-years confinement for appellant as a habitual felon. *See* Tex. Penal Code Ann. §§ 12.42(d) (punishment range for habitual felony is imprisonment for life, or for any term of not more than 99 years or less than 25 years), 19.04(a) (person commits manslaughter "if he recklessly causes the death of an individual"), (b) (manslaughter is second-degree felony).

[13] More significantly, if the jury had returned a guilty verdict on criminally negligent homicide instead of on murder or manslaughter, appellant would not have even been subject to punishment as a habitual felon and could not have received 30-years confinement. *See* Tex. Penal Code Ann. §§ 12.35(a) (punishment range for state jail felony is confinement for any term of not more than two years or less than 180 days), 12.42(d) (habitual-felon statute does not apply to state jail felony), 19.05(a) (person commits criminally negligent homicide "if he causes the death of an individual by criminal negligence"), (b) (criminally negligent homicide is state jail felony).

***12** Instead of providing the jury with it once by oral readback in the courtroom, the trial judge treated appellant's disputed trial testimony as an admitted written exhibit so that it was available to be passed among the jury in the jury room, and to be read and considered without time or other restraint. *See* Tex. Code Crim. Proc. Ann. art. 36.25. Although bringing out the jury and

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providing it with one-time oral readback of disputed testimonial evidence properly strikes a balance between the trial judge's commenting on the weight of the evidence with the need to provide the jury with the means to resolve any factual disputes, *see Thomas*, 505 S.W.3d at 923, I cannot help but conclude that the provision of excerpts from the court reporter's notes in written transcript form concerning an essential element of the alleged offenses to be accessed and considered as written evidence in the jury room, over appellant's objection, amounted to an impermissible comment on its importance by the trial judge and unfairly tipped that balance in favor of the State (and to the highest degree of offense, murder) in appellant's case. *See* Tex. Code Crim. Proc. art. 38.05.

This is especially the case when appellant's testimony indicated he could not maintain a consistent story about what happened and what he felt during the incident, *i.e.*, his culpable mental state. Appellant's disputed testimony provided to the jury by written transcript concerned whether appellant "felt threatened" by Barriere and Harris. The trial judge provided approximately four pages of written transcript excerpts to the jury. In relevant part, appellant's testimony on direct indicated that Barriere took a couple of steps toward appellant, appellant was afraid, and appellant raised the shotgun "just to scare" and "back [Barriere] up." Appellant's testimony on cross-examination indicated that Harris told appellant "you're not going to leave me here" and charged appellant; appellant was holding the gun but pointed it up in the air, not at Harris. Appellant's testimony on re-direct indicated he was scared when Barriere was coming towards appellant and he thought Barriere could seriously injure or even kill him. Appellant's testimony on re-cross indicated that when the "gun went off the first time," Harris was actually walking away from appellant; appellant was not trying to defend himself with the gun, and it "just accidentally went off." Appellant's testimony on further re-direct indicated he was trying to defend himself by raising the gun and showing it to Barriere and Harris.

Instead of resolving its disagreement over appellant's testimony based on listening to it being read back one time in the courtroom, the jury was able to (re)read and (re)consider his conflicting testimony—in writing, in the jury room, as much as it may have wanted. In appellant's case, this was not an insignificant error. I am not convinced that the trial judge's actions did not influence the jury's verdict or only had but very slight effect. *See Kotteakos v. United States*, 328 U.S. 750, 764, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). Instead, I harbor grave doubts that this error substantially influenced the jury's decision to find appellant guilty of murder instead of a lesser-included offense, and I am unable to disregard it. *See id.*

The court concludes that appellant was not harmed because the content of the written testimony sent back in written transcript form was the same as what would have been read to the jury if the trial judge had complied with article 36.28. But this effectively nullifies the legislature's plain, unambiguous intent in passing not only article 36.28, but also article 36.25, regarding permissible methods available to the trial judge to provide evidence to a deliberating jury. Again, the legislature only allows the trial judge to provide a deliberating jury with requested admitted exhibits and with oral readback or witness recreation of disputed testimony.[14] Moreover, the cases "to the contrary" on which the court relies do not dictate the result in this appeal. None of those cases involved circumstances in which a defendant timely raised a "specific legal objection ... that [providing the disputed testimony in written transcript form] is a comment on the weight of the evidence by the Court," like appellant did.[15] None of those cases involved the particular highlighting of a defendant's own trial testimony—regarding whether he possessed the requisite intent to have committed murder as opposed to a lesser-included offense—at issue here.

14 "[A]ny redefining" of jury procedure "best be facilitated legislatively." *Morrison v. State*, 845 S.W.2d 882, 887 & n.13 (Tex. Crim. App. 1992) ("The Code of Criminal Procedure sets forth numerous rules of procedure applicable to juries [such as article 36.28] with considerable detail."). In other words, it is up to the legislature to decide whether to amend jury procedure in the Code of Criminal Procedure to authorize trial judges to provide juries with written transcripts of trial testimony during deliberations. And it would be up to the legislature to determine the contours of any such provision, such as when the jury could or would have such access (upon actual disagreement or request) and whether such access would be only to certain portions or the entirety of the court reporter's notes of the trial testimony.

15 If appellant had waived compliance with article 36.28 consistent with *Marin*, then I would not be dissenting. *See* Tex. R. App. P. 33.1. The fact that some trial judges may allow written transcripts to go back to jury rooms without that issue being raised on appeal merely means the issue is undecided.

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***13** The court further concludes that even if a written format emphasized the testimony more than an oral format, appellant was not harmed because testimony from both the State's and his trial counsel's examination of him was sent back to the jury. While the contradictory testimony provided was not one-sided in the sense that it was not just elicited by the State, it certainly was one-sided in that it involved appellant's impeachment of himself as to his culpable mental state during the shooting, which favored the State. The undue emphasis was of evidence clearly detrimental to appellant.

Finally, the court concludes there was other evidence to support murderous intent and the State focused on appellant's actions in its closing, so that the trial judge's conduct can be disregarded as a mere procedural irregularity. I disagree. While the evidence may have been legally sufficient to support a murder conviction, the trial judge's improper highlighting of appellant's conflicting testimony regarding his culpable mental state while the jury was deliberating on that very issue (without any instruction that the trial judge was not in fact emphasizing appellant's testimony to the jury) had more than a slight effect and affected appellant's substantial rights.

The trial judge did not follow the plain meaning of the law. I would not act as a "super legislator" and effectively repeal article 36.28 from the Code of Criminal Procedure. The Texas Legislature has never given general ruling-making power over criminal procedure to the Court of Criminal Appeals, and it is certainly not this court's place to erase a statute no one contends is unconstitutional.

I would sustain appellant's first issue, reverse the trial court's judgment, and remand the case for further proceedings. *See* Tex. R. App. P. 43.2(d). I respectfully dissent.

All Citations

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